(31,244)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 521

STANLEY P. ASHE, WARDEN OF THE STATE PENITENTIARY FOR THE WESTERN DISTRICT OF PENNSYLVANIA, APPELLANT,

vs.

THE UNITED STATES OF AMERICA EX REL. JOSEPH VALOTTA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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[fol. 3] **IN UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF PENNSYLVANIA**

No. 6

THE UNITED STATES OF AMERICA ex Rel. JOSEPH VALOTTA

vs.

STANLEY P. ASHE, Warden of the State Penitentiary for the Western District of Pennsylvania

Habeas Corpus

DOCKET ENTRIES

Oct.	15, 1924.	Petition for writ of Habeas Corpus and order filed and entered granting same, directing the Warden of the State Penitentiary for the Western District of Pennsylvania, to produce the body of Joseph Valotta in this court on the 5th day of Nov. 1924, at 10 A. M., with stay of execution pending determination of this writ.
"	" "	Writ of Habeas Corpus issued ret'ble to Nov. 5, 1924 at 10 A. M.
"	" "	(3) Cert. Copies of the Writ issued.
"	" "	(2) " " Order of Court issued.
"	" "	Ex. #1 Record Appeal to Supreme Court of Penna.; Ex. #2 Petition for reargument in Supreme Court; and Ex. #3 Cert. Copy record from Court of Oyer and Terminer of Ally. County, filed.
"	29, "	Order extending return day of Writ to Dec. 1st, 1924 at 10 A. M. filed and entered.
Nov.	28, "	Answer filed.
Dec.	1, "	Replication of Joseph Valotta filed.

Dec. 1, 1924. Petition for amendment, supplemental reasons, filed by leave of Court.
" 1, " Hearing on Writ of Habeas Corpus.
" " " Witnesses sworn for complainant (12).
" " " Witnesses sworn for respondent (4).
Dec. 2, " Hearing proceeds.
" 3, " Hearing concluded.
" " " Memoranda of trial filed.
" " " Order committing Jos. Valotta to the Allegheny County Jail pending the final disposition of this Writ filed & entered.
" " " Temp. Commitment & Copy issued. (Ally. Co. Jail.)
" " " (3) Certified Copies Order issued.
" 16, " Order directing the Warden of Allegheny County Jail to produce Joseph Valotta before this Court on Wed. Dec. 17, 1924
[fol. 4] at 10 A. M. filed and entered.
Dec. 16, 1924. (2) Certified Copies order issued.
" " " Cert. Copy of order with service noted thereon returned & filed.
" 17, " Opinion discharging relator filed & entered.
" 19. " Order filed & entered discharging relator.
" " " Certified Copy order issued.
" " " Testimony hearing Dec. 3, 1924, filed.
Jan. 5, 1925. Petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, for appeal; Certificate of Probable Cause and Order allowing appeal filed & entered.
" " " Assignment of Errors on appeal filed.
" 9, " Citation awarded and issued.
" 12, " Service of Citation accepted by F. A. Ammon, Atty. for Jos. Valotta.
" 5, " Petition and order extending time until the 9th day of March 1925, for filing record on appeal filed & entered.
" 18, " Præcipe for transcript of Record on appeal and acceptance of service thereon filed.
Mar. 3, " Petition and order extending time until April 9, 1925 for filing record on appeal filed & entered.

Apr. 3, 1925. Petition and order extending time until May 9, 1925 for filing record on appeal filed & entered.

[fol. 5] [File endorsement omitted]

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed October 15, 1924

To the Honorable the Judges of the said Court:

Your petitioner, Joseph Valotta, respectfully represents and shows to this Honorable Court:

(1) That he is a citizen of the United States and a resident of the Commonwealth of Pennsylvania and of the City of Pittsburgh, in the County of Allegheny in the Western District thereof.

(2) That your petitioner is unjustly and unlawfully detained and imprisoned in the electrocution building of the State Penitentiary for the Western District of Pennsylvania, by virtue of a warrant of commitment, a copy of which is hereto attached, made part hereof and marked "Exhibit A"; and a receipt for the body of Joseph Valotta, No. 172, from John M. Egan, Warden of said prison, a copy of which is hereto attached, made part hereof and marked "Exhibit B."

The said John M. Egan has since resigned as Warden of said Penitentiary, and Stanley P. Ashe has been duly appointed Warden in his place, has entered upon the duties of his office, and has custody of the petition under and by virtue of the said warrant.

(3) That your petitioner was indicted for the murder [fol. 7] of one Thomas Hopkins by the Grand Jury of the said County of Allegheny, which indictment was set down for trial in the Court of Oyer and Terminer of said Allegheny County, at No. 19 February Sessions, 1923.

(4) That your petitioner was indicted for murder of one Edward C. Couch by the Grand Jury of the said County of Allegheny, which indictment was set down for trial in the Court of Oyer and Terminer of said Allegheny County, at No. 17 February Sessions, 1923.

(5) That defendant being without any means for his defense, and without counsel, the said Court did on February 6, 1923, appoint Franklin A. Ammon, Esq., attorney for the defendant under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania of March 27, 1907, who was and continued to be sold counsel for defendant until some time after July 1, 1924.

(6) That said two indictments were called for trial on March 12, 1923 in the said Court of Oyer and Terminer. Your petitioner was first arraigned on the indictment at No. 19 February Sessions, 1923, to which arraignment he pleaded not guilty. Instead of proceeding with the trial upon said plea to determine the issues raised by the said indictment, your petitioner was forthwith arraigned on the indictment at No. 17 February Sessions, 1923, to which he pleaded not guilty. One jury was then called for the trial of both of these indictments. There was no motion for the consolidation of the indictments, no Order of Court consolidating them, nor was the prisoner's inalienable right to separate trial considered by the Court, nor was there any investigation by the Court or exercise of judicial discretion by the Court to support the trial of the said two indictments, before the same jury. The Commonwealth did not elect upon which indictment it would proceed, nor did the Court require it to elect at any stage of the proceedings upon which indictment it would proceed. The Petitioner at the trial was deprived of his right to twenty peremptory challenges on the trial of each in- [fol. 8] dictment, under which he might choose to have a particular juror to try one of the offenses, yet be altogether averse to him with regard to the other. By reason of the course of the procedure, as herein set forth, and as appears from an inspection of the full record, your petitioner was confounded in his defense, prejudiced in his challenges and the jury was confused, distracted and prejudiced against your petitioner by reason of the sub-

mission to it of testimony on two separate issues, a considerable part of which would not have been admissible in the trial upon either indictment separately, nor were the rights of the accused safeguarded as required by the law of the land.

(7) The said trial was so proceeded with that upon the termination thereof the said jury brought in a verdict of guilty of murder in the second degree for the killing of Thomas Hopkins upon the indictment at No. 19 February Sessions, 1923. Without awaiting any action of the Court thereon, the same jury shortly thereafter brought in a second verdict finding your petitioner guilty of murder in the first degree for the killing of Edward C. Couch upon the indictment at No. 17 February Sessions, 1923.

(8) No sentence was imposed under the verdict at No. 19 February Sessions, 1923, but under the verdict at No. 17 February Sessions, 1923, on June 28, 1923, your petitioner was sentenced to be executed, and in pursuance of such sentence was confined and continues to be confined, as herein set forth, the date fixed for his execution being October 20, 1924, the Court having overruled the plea of your petitioner to be sentenced first upon the verdict first found.

(9) Your petitioner, through his counsel, took an appeal to the Supreme Court of Pennsylvania at No. 158 October Term, 1923, and the said appeal was dismissed by the said Court on January 7, 1924.

(10) After the dismissal of the said appeal, your petitioner was advised by said counsel that a writ of error to the Supreme Court of the United States could not be taken [fol. 9] without the expenditure of some hundreds of dollars for the printing of the record, and your petitioner being without funds and unable to secure funds for the printing of the record as advised, was unable to apply for such writ of error, and the statutory period within which such application could be made has now expired.

(11) That on September 29, 1924, your petitioner applied to the Supreme Court of Pennsylvania for a reargument of his appeal in the said Court, which reargument was on October 6, 1924 refused.

(12) Your petitioner attaches hereto a complete and correct transcript of the record, and also correct copy of his petition for reargument presented to the said Court, having attached thereto the opinion of the Supreme Court in dismissing the appeal, both of which records your petitioner files as part of this petition.

(13) Your petitioner further shows that his detention and imprisonment as aforesaid is illegal and in violation of his right as a citizen of the United States and of the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" for the following reasons:

(a) There was no evidence to sustain a verdict of murder in the first degree under the laws of Pennsylvania, and by his conviction, detention and sentence for execution, petitioner has been deprived of due process of law in this respect.

(b) By the trial of the two separate indictments before one jury in the manner above set forth.

(c) By depriving your petitioner of the right to twenty peremptory challenges under each indictment.

(d) By depriving your petitioner of his rights under the [fol. 10] Act of Assembly of the Commonwealth of Pennsylvania of March 15, 1911, P. L. 20.

(e) By depriving your petitioner of his right to be tried on each indictment by an impartial jury.

(f) By depriving your petitioner of his right to trial by a jury of petitioner's peers.

(g) By rejecting petitioner's plea for sentence upon the second degree verdict at No. 19 February Sessions, 1923, the same having been rendered first in open court, and sentencing him to death on the first degree verdict subsequently rendered at No. 17 February Sessions, 1923.

(h) By subjecting your petitioner for the same offense to be twice put in jeopardy of life.

(i) The proceedings against your petitioner were not conducted according to the settled course of judicial proceedings as established by the law of Pennsylvania.

(j) The criminal prosecution of your petitioner was not according to the established modes of procedure in Pennsylvania.

(k) The procedure adopted by the Court was in violation of Article 1, Section 9 of the Constitution of Pennsylvania.

(l) A sworn statement of your petitioner was offered in evidence against him by the Commonwealth.

(m) The proceedings were in violation of the Act of March 31, 1860, Section 25 of the Statutes of Pennsylvania.

(n) The Court of Oyer and Terminer of Allegheny County, Pennsylvania, by proceeding as herein set forth, lost its jurisdiction and its judgment and sentence are wholly void.

Wherefore, to be delivered from the unjust and illegal imprisonment above set forth, your petitioner now applies, praying that a writ of habeas corpus may be issued according to Chapter 2, Section 14 of the Revised Statutes of the United States of America, giving Your Honorable District [fol. 11] Court jurisdiction herein; also according to the Habeas Corpus Statutes giving Your Honorable District Court power to issue writs of habeas corpus in such case made and provided, so that your petitioner may be brought before this Honorable Court to do and submit to and receive what the laws may require.

Joe Valotta.

Duly sworn to by Joe Valotta. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO PETITION FOR HABEAS CORPUS

State of Pennsylvania for the Western District of Pennsylvania, Electrocution Building, Rockview, Pa.

COMMONWEALTH OF PENNSYLVANIA

vs.

JOSEPH VALOTTA

To Robert G. Woodside, high sheriff of the county of Allegheny, and to any warden, prison keeper, or officer of this Commonwealth having the custody of Joseph Valotta; Greetings:

By virtue of a warrant issued February 11th, 1924, by Gifford Pinchot, Governor of the Commonwealth of Pennsylvania, commanding me to cause one Joseph Valotta to be executed in this institution, in the manner prescribed by law, I hereby notify you to forthwith deliver the said Joseph Valotta to the Electrocution Building of the State of Pennsylvania for the Western District of Pennsylvania, Rockview, Center County, Pennsylvania, where he shall remain until the penalty of death has been legally inflicted or until lawfully discharged from my custody.

(Signed) John M. Egan, by Fred B. Healy, Deputy Warden.

[fol. 13] EXHIBIT "B" TO PETITION FOR HABEAS CORPUS

State Penitentiary for the Western District of Pennsylvania, Electrocution Building

No. 172

Rockview, Pa., April 12th, 1924.

Received from Robert G. Woodside, High Sheriff of the County of Allegheny, prisoner, Joseph Valotta, convicted of murder in the first degree and sentenced to be executed in the Electrocution building of the State Penitentiary for the Western District of Pennsylvania.

(Signed) John M. Egan, Warden, by Fred B Healy, Deputy Warden. (Seal.)

Attest: M. M. Cobb, Clerk.

[fol. 14] Exhibit to Petition for Habeas Corpus

In the Supreme Court of Pennsylvania, Western District, October Term, 1923

No. 158

Commonwealth

vs.

Joseph Valotta, Appellant

Record

Caption

Appeal from the Judgment and Sentence of the Court of Oyer and Terminer of Allegheny County, at No. 17, February Term, 1923.

Franklin A. Ammon, Attorney for Appellant, Curry Building, Pittsburgh.

[fol. 15] In Court of Oyer and Terminer of Allegheny County

Docket Entries

Court of Oyer and Terminer met Friday, March 2nd, 1923, at 9:30 o'clock, A. M.

No. 17-19, February Sessions, 1923

Commonwealth

vs.

Joseph Valotta

True Bill

Charge: First Count, Murder; Second Count, Voluntary Manslaughter

Judge: Reid (F. A. Ammon)

Order of Court

And now, to-wit, March 2nd, 1923, the within petition having been presented in open court, and upon due consid-

eration thereof, an allowance for necessary expenses in the defense of Joseph Valotta is allowed, not to exceed the sum of fifty ($50.00) Dollars.

Court of Oyer and Terminer Met Tuesday, February 6th, 1923, at 9:30 o'clock, A. M.

[Title omitted]

Order of Court

And now, to-wit, February 6th, 1923, the foregoing petition having been presented upon consideration thereof F. A. Ammon, Esq., is hereby appointed attorney for the Defendant at the trial of this case, under the provisions of the Act of Assembly of March 22nd, 1907.

[fol. 16] Court of Oyer and Terminer met Wednesday March 7th, 1923, at 9:30 o'clock, A. M.

[Title omitted]

Order of Court

And now, March 7th, 1923, the foregoing petition presented in open Court and Jos. Anthony is permitted to accompany Franklin A. Ammon, Esq., into the Jail to interpret for him in consultation with the Defendant Joseph Valotta.

Court of Oyer and Terminer met Monday, March 12th, 1923, at 9:30 o'clock, A. M.

List of jurors challenged peremptorily by the Commonwealth, challenged peremptorily by the defense, challenged for cause by the Commonwealth and sustained by the Court, challenged for cause by the Commonwealth and overruled by the Court, challenged for cause by the defense and overruled by the Court, excused by agreement of counsel and consent of the Court, and sworn in the case of

[Title omitted]

[fol. 17] Challenged peremptorily by the Commonwealth: A. S. Waselief, Geo. F. Horne, W. B. Harvey, Thos. Con-

roy, Barney Woods, Otis Johnson, Frank Larkin, Mrs. Nellie Riley, Frank M. Potter, Abraham Cohen, John J. O'Reilly, John McClafferty, Matthew Fulmer, J. W. Bowser, A. J. Walker.

Challenged peremptorily by the Defense: W. L. Sechler, John Mullin, John C. Smith, Terrence Boyle, Casper Stein, Alex. T. Heyl, Robt. J. Brownless, John Voekler, M. R. Wilson, John Doris, Frank Ross, A. J. Puffenberg, M. P. Jones, Sr., Harry G. Griffeths, John F. Collins, M. E. Scorer, Wm. J. Kopp.

Challenged for cause by the Commonwealth and sustained by the Court: Mrs. Herbert F. Byram, W. Franklin Smiley, Geo. Zeilfelder.

Challenged for cause by the Commonwealth and overruled by the Court: A. D. Waseleif, Abraham Cohen, M. E. Scorer.

Challenged for cause by the Defense and overruled by the Court: Terrence Boyle, Harry G. Griffith.

Excused by agreement of Counsel and consent of the Court: James E. Bailey.

Sworn: 1, Nicholas Brier; 2, James L. Bell; 3, Henry E. Sellers; 4, Mrs. Isabella Griffith; 5, Russell L. Van Cleve; 6, John C. Barrett; 7, Mrs. Wesley Hale; 8, Jos. Bechtol; 9, Slyvester Rooney; 10, W. C. Landis; 11, Albert Marks; 12, A. D. Jones.

[Title omitted]

Witnesses for Commonwealth

Harry T. Ewing, Dr. Dewayne G. Ritchie, Wm. H. Felix, Dr. H. S. Wallace, Wm. Helmich, Mrs. Estelle Couch, W. F. Detts, Albert Brady, Wm. Rodgers, Clyde S. Edeburn, Wilbert Conoran, Richard Poter, Ambrose Musher, Joseph Palermo, Mary Randazzi, John J. Morgan, Clarence Brown, Dominick Randazzi, Tony Valotta, Michael Forterelli, Noah Ward.

[fol. 18] Witnesses for Defense

Joseph Valotta, John J. Lamph, Geo. F. Erhardt, G. E. Sarver, Geo. J. Heinline, Charles A. Gibson, Charles A. Simms, Wade McClure, Mrs. Edna Lascher, Wm. E. Gey-

ser, Ralph Zilian, Harry Steigerwald, John V. Wilson, Edward Hough, Frank Hough, Tony Porrento, Sam'l Hough, Sr.

Witnesses for Commonwealth—Rebuttal

Wm. J. Kane:

And now March 12th, 1923, the Defendant Joseph Valotta being present in open Court and the Hon. Ambrose B. Reid, being specially detailed to hold the February Sessions, A. D. 1923, of said Court, and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions, A. D. 1923, of said Court and the Hon. Ambrose B. Reid, Hon. Jas. R. MacFarlane, Hon. Thos. D. Carnahan, Hon. Charles H. Kline, and the Hon. Harry H. Rowand, being severally present upon the Bench, and the Defendant Joseph Valotta being still present in open Court being told to stand up and hold up his right hand and being duly arraigned pleads Non Cul and of this puts himself upon God and his country for trial. District Attorney similiter issue joined. Eo die a Jury being called and the Defendant Joseph Valotta being still present in open Court and by his Counsel exercising his right of challenge there came Nicholas Brier, James L. Bell, Henry E. Sellers, Mrs. Isabella Griffiths, Russel L. Van Cleve, John C. Barrett, Mrs. Wesley Hale, Joseph Bechtol, Slyvester Rooney, W. C. Landis, Albert Marks, A. D. Jones, twelve good and lawful men and women duly summoned, returned, elected by bollot, empanelled and sworn, Eo Die the Clerk then read the Indictment to the Jury after which he addressed the Jury as follows: Upon this Indictment he hath been arraigned and thereto hath pleaded Not Guilty and hath put himself upon God and his country, which country you are for trial, so that your charge is to inquire whether he is Guilty or Not Guilty of the felony wherewith he stands charged. If you find him Guilty, you will say whether he is Guilty of Murder of the First Degree, of Murder of the Second Degree, or of Voluntary Manslaughter, but if you find him Not Guilty you will say so and no more. Remain together and hear the evidence. Eo die at 4:00 o'clock P. M. the defendant Joseph Valotta being still present in open Court,

the Jury retired to their room and Court Adjourned to convene Tuesday, March 13th, 1923, at 9:30 o'clock, A. M. The defendant Joseph Valotta remanded.

Court of Oyer and Terminer met Tuesday, March 13th, 1923, at 9:30 o'clock, A. M.

[fol. 19] [Title omitted]

And now March 13th, 1923, the Defendant Joseph Valotta being present in open Court, and the Hon. Ambrose B. Reid, being specially detailed to hold the February Sessions, A. D. 1923, of said Court and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions, A. D. 1923, of said Court and the Hon. Ambrose B. Reid, Hon. Jas. R. Macfarlane, Hon. Thos. D. Carnahan, Hon. Charles H. Kline, and the Hon. Harry H. Rowand being severally present upon the Bench trial resumed.

March 13th, 1923, at 4:00 o'clock, P. M. the Defendant Joseph Valotta being still present in open Court the Jury retired to their room and Court adjourned to convene, Wednesday, March 14th, 1923, at 9:30 o'clock, A. M. The defendant Joseph Valotta remanded.

Court of Oyer and Terminer met Wednesday March 14th, 1923, at 9:30 o'clock, A. M.

[Title omitted]

And now, March 14th, 1923, the Defendant, Joseph Valotta being presented in open Court, and the Hon. Ambrose B. Reid being specially detailed to hold the February Sessions, A. D. 1923, of said Court, and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions, A. D. 1923, of said Court, and the Hon. Ambrose B. Reid, Hon. Jas. R. MacFarlane, Hon. Thos. D. Carnahan, Hon. Charles H. Kline, and the Hon. Harry H. Rowand, being severally presented upon the Bench, trial resumed.

[fol. 20] March 14, 1924, at 3:50 o'clock P. M., the Defendant Joseph Valotta being still present in open Court,

the Jury retired to their room to deliberate upon a verdict. Eo die at 6:00 o'clock P. M. the Defendant Joseph Valotta being still present in open Court the Jury returns with their verdict. The Foreman then arises and pronounces their verdict aloud, that upon their solemn oaths they respectively do say: That they do find the Defendant Joseph Valotta, Guilty of Murder in the First Degree and so say all. Eo die, Whereupon F. A. Ammon, Esq., Attorney for the Defendant Joseph Valotta, asks the Court for a Poll of the Jury. Whereupon the Court instructs the Clerk to Poll the Jury. Each and every Juror being separately Polled and asked if they had agreed upon a verdict and each answering "I have" and being asked by the Clerk, "In this issue joined between the Commonwealth and Joseph Valotta, the Prisoner at the Bar, how say you, Is he Guilty or Not Guilty of the Felony wherewith he stands charged? Each and every Juror answered, "I find the Defendant Joseph Valotta, Guilty of Murder in the First Degree. Eo die the Defendant Joseph Valotta remanded

March 16th, 1923, motion and reasons for New Trial filed.

March 31st, 1923, motion in Arrest of Judgment and reasons filed.

April 4th, 1923, Supplemental Reasons for New Trial filed.

And now, May 28th, 1923, the Defendant Joseph Valotta being present in open Court, Motion for New Trial and Motion in arrest of Judgment argued C. A. V.

And now, June 28th, 1923, the Defendant Joseph Valotta being presented in open Court, Motion for New Trial refused and Eo die Motion in Arrest of Judgment overruled. (See opinion and Order filed) Eo die, the Defendant Joseph Valotta being still present in open Court the District Attorney moves the Court for Judgment, Joseph Valotta, the Defendant upon being asked by the Hon. Charles H. Kline if he had aught to say why sentence of the Law should not be passed upon him and the Defendant Joseph Valotta having had his say the Court proceeded to pronounce the sentence of the Law as follows:

And now, June 28th, 1923, the sentence of the Law is that you, Joseph Valotta, be taken hence by the Sheriff of Allegheny County, to the Jail of that County, from whence

you came, and from thence, in due course, to the Western Penitentiary, in Centre County, Pennsylvania, and that you there, suffer death, during the week, fixed by the Governor of the Commonwealth, in a building erected for the purpose, on land owned by the Commonwealth, such punishment being inflicted by either the Warden or Deputy-Warden of the Western Penitentiary, or by such person, as the Warden shall designate, by causing to pass through your body, a current of electricity, of intensity, sufficient to cause death, and the application of such current, to be continued until you are dead. May God in His infinite goodness, have mercy on your soul.

July 18, 1923, Supreme Court Certiorari filed.

[fol. 21] IN COURT OF OYER AND TERMINER

INQUEST

STATE OF PENNSYLVANIA,
Allegheny County, ss:

An inquisition, indented, taken at 22nd and 1st Wd. Pgh. in the County of Allegheny, on the 30 Oct. and 14 day of Nov. A. D. 1922, before me, W. J. McGregor, M. D., Coroner of the County aforesaid, upon the view of the body of Edward C. Couch then and there lying dead, upon the oath and solemn affirmations of six good and lawful men of the County aforesaid, who, being sworn and affirmed and charged to inquire, on the part of the Commonwealth, when, where and how, and after what manner, the said Edward C. Couch came to his death, do say, upon their oath and affirmations aforesaid that the said Edward C. Couch, age, 44 years, nationality, American, social relation, married, policeman, and residing at 1423 Porterfield St., Pgh, Pa., came to his death at the Presbyterian Hospt., Pgh, Pa., on Monday, Oct. 30th, 1922, at 2:05 A. M. from gun shot wound in abdomen received at the corner Irwin Ave. and Freedmore St., N. S. Pgh., Pa., on day and date above named at 1:15 A. M. from gun in the hands of one Joseph Valotta and from the evidence and Post Mortem Examination made the Jury find death was to the above

cause and recommend that the said Joseph Valotta be held to await the Action of the Grand Jury upon a charge of Murder. And so the Jurors aforesaid, upon their oaths and affirmations as aforesaid, say that the aforesaid Edward C. Couch for the cause aforesaid, in the manner and form aforesaid, came to his death, and not otherwise.

In witness whereof, as well as of the aforesaid Coroner, we the Jurors, have hereunto put our hands and seals, on the day and year and the place above mentioned.

W. J. McGregor, Coroner. (Seal.) 1. J. C. Deephney. (Seal.) 2. Justus Lange. (Seal.) 3 August Fox. (Seal.) 4. B. A. Montgomery, (Seal.) 5. L. W. Miller. (Seal.) 6. R. L. Van Dyke. (Seal.)

[fol. 22] In Court of Oyer and Terminer of Allegheny County

Bill of Indictment

In the Court of Oyer and Terminer and General Jail Delivery for the County of Allegheny of February Sessions, A. D. 1923.

Allegheny County, ss:

The Great Inquest of the Commonwealth of Pennsylvania, now, inquiring in and for the body of the County of Allegheny, upon their oaths and solemn affirmations, respectively, do present that Joseph Valotta late of the County aforesaid, yeoman on the thirtieth day of October in the year of our Lord, one thousand nine hundred and twenty two, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, in and upon the body of one Edward C. Couch in the peace of God and this Commonwealth then and there being, feloniously, wilfully and of his malice aforethought did make an assault and him, the said Edward C. Couch then and there feloniously, wilfully and of his malice aforethought did kill and murder, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Joseph Valotta on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, in and upon the body of the said Edward C. Couch in the peace of God and of this Commonwealth then and there being, feloniously did make and assault, and him, the said Edward C. Couch, then and there feloniously did kill and slay, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Test Pro. Respub.: W. J. McGregor, Clyde Edeburn, J. J. Morgan, Robert H. Braun, Frank Crowley, Clarence Brown, Wm. J. Kane, F. Dodson, Jno. J. McInerney, J. Schnuer, Ambrose Musher, John Beck, John Skillcorn, John Platt, Andy Caserri, Joe Palerino, Jerry Deasy, Dom Randazzi, Mary Newman, M. Tarterella, Phillip Marmo, Sam De Couko.

Sworn by me.

Samuel H. Gardner, District Attorney for Allegheny County. G. H. Wolfe, Foreman.

[fol. 23] In the Court of Oyer and Terminer and General Jail Delivery in and for the County of Allegheny, Penna.

Before Hon. Charles H. Kline, J., and a Jury

[Title omitted]

Trial commenced Monday, March 12, 1923.

Statement of Evidence

Appearances of Counsel

For the Commonwealth: Asst. Dist. Atty. Harry A. Estep.
For the Defendant: Franklin A. Ammon, Esq.

Official notes of trial: Messrs. A. W. Bowman & E. J. Donnelly, Reporters.

TESTIMONY OF HARRY T. EWING

HARRY T. EWING sworn.

Examination by Mr. Estep:

Q. What is your name?
A. Harry T. Ewing.
Q. Where do you live?
A. 3810 Fifth Avenue, Pittsburgh.
Q. What is your business?
A. Chief Deputy Coroner of Allegheny County.
Q. Was there an inquest held on the body of one Thomas Hopkins?
A. Yes sir.
Q. When was that held?
A. November 14th, 1922, in the Coroner's Court, Morgue Building, Pittsburgh, Pa.
[fol. 24] Q. And was there an inquest held on the body of one Edward C. Couch?
A. There was, same time and same place.
Q. Was there a binding over at that time of the defendant?
A. Yes, sir.
Q. Were there any Exhibits offered at that inquest?
A. There was; one 38 calibre revolver, Smith & Weston, and five empty shells. Also one — calibre bullet taken from the body of Thomas Hopkins, and a bullet taken from the body of Edward Couch.
Q. Who turned the 38 calibre Smith & Weston revolver over to you?
A. John J. Morgan, city detective.
Q. And the five empty shells?
A. John Morgan.
Q. And who turned the bullet over to you that was removed from the body of Thomas Hopkins?
A. Dr. DeWayne G. Richey.
Q. And who turned over to you the 38 calibre bullet removed from Edward C. Couch?
A. Dr. Richey. There is also another gun, a 32 calibre Smith & Weston, and fourteen loaded cartridges turned over by No. 12 police to Deputy Coroner Felix, being the revolver owned by Edward Couch.

(No cross-examination.)

Testimony of Dr. DeWayne G. Richey

Dr. DeWayne Richey sworn.

Examination by Mr. Estep:

Q. What is your name?
A. DeWayne G. Richey.
Q. What is your business?
A. I am a physician.
Q. A practicing physician of Allegheny County?
A. Yes, sir.
Q. How long have you been practicing medicine?
A. Since June, 1916.
Q. And where did you receive your preliminary training?
A. At the Medical Department of the University of Pittsburgh.
Q. And where do you have your office at the present time?
A. Mercy Hospital.
[fol. 25] Q. Are you connected with the Mercy Hospital in any official capacity?
A. Yes, sir, I am Chief of Laboratory.
Q. Doctor, did you perform an autopsy on one Thomas Hopkins?
A. I did.
Q. When?
A. The autopsy was begun at 9:00 o'clock in the morning of October 20th, 1922.
Q. Where was it performed?
A. At the Allegheny County Morgue, Pittsburgh, Pa.
Q. Just tell the court and jury what you found as the result of the autopsy on the body of Thomas Hopkins?
A. The body was that of an adult, white male, five feet six inches in height, about 135 pounds in weight, and 35 years of age, showing the following mark of recent injury. There was an oval penetrating wound measuring one-half by three-eighths of an inch on the left anterior chest wall, one and three quarter inches to the left of the midline, one-half inch below the clavicle bone at the level of the junction of the rib with the breast bone—of the second rib of the breast bone. Upon dissection the wound was found to continue backward, slightly downward and to the right, splintering the second left rib at the point where it

joins the cartilage, perforating the upper lobe of the left lung, tearing a ragged hole one-half inch in diameter in the left lateral wall of the aorta at the beginning of the descending limb, passing through the articulation of the sixth rib with the fifth and sixth dorsal vertibræ, to end in the muscles of the back where a lead bullet of about 38 calibre was found. This bullet can be identified by a deep linear groove one-quarter inch at tip, a crescentic, shallower groove five-eighths of an inch to the left of the deeper one, and a shorter curved groove at the base and to the right of the second one. On the base will be found "R" and "H." There were fully two quarts of blood in the left plural cavity. On the back of the left hand, at the base of the thumb, a "T" shaped tat-oo mark was seen, and the initials T. H., above which were four blue dots, occurred on the under surface of the right forearm, two inches below the elbow. Aside from the above described wound, the body was that of a healthy adult male. From this examination I am of the opinion that death resulted from shock and hemorrhages, following a gun-shot wound of chest through the left lung and the aorta.

Q. What is the aorta?

A. It is the large artery that comes from the heart, the largest artery in the body, and supplies the blood by its various branches.

Q. And the bullet passed through the aorta?

A. That is correct.

Q. Show the jury the place where that bullet passed.

A. (Witness leaving stand.) The left front chest wall, just below the collar bone, and three-quarters of an inch to the left of the midline; it went backward and slightly downward from left to right, perforating the upper lobe [fol. 26] of the left lung, and lodged in the muscles of the back.

Q. Did you recover the bullet?

A. Yes, sir.

(Envelope containing bullet marked Exhibit No. 1.)

Q. I show you Exhibit No. 1, and ask you what that is?

A. That is a bullet I removed from the body of Thomas Hopkins.

Exhibit No. 1 offered in evidence.

Q. Doctor, did you perform an autopsy on the body of one Edward Couch?

A. I did.

Q. When?

A. This autopsy was begun at 10:00 o'clock in the morning of October 30th, 1922.

Q. Where?

A. At the Allegheny County Morgue, Pittsburgh, Pa.

Q. Will you just tell the court and jury what you found as a result of that autopsy?

A. The body of Edward Couch was that of an adult, white male, five feet eleven inches in length, about 200 pounds in weight, and 50 years of age, showing the following marks of recent injury. There was a small, oval penetrating wound one-half inch in diameter in the left lateral abdominal wall in the anterior axiliary line at the level of the lower margin of the rib. This wound, upon dissection, was found to continue from left to right, slightly upward and forward to perforate the coils of the small intestines in four places, the transverse colon in one place, and the liver, obliquely, in its left lobe, where a stellate hole was found on the interior and superior surfaces. It was apparent that the bullet had ricocheted, for the wound could not be followed further. There was a small, oval, penetrating wound one-half inch in diameter, in the left anterior abdominal wall, three inches to the left and two inches below the navel. Upon dissection this wound was found to continue backward, downward and to the right, perforating the coils of the small intestines in seven places, and the mesentery at two levels to penetrate the retroperitoneal pelvis tissues, and to disappear deep in the pelvis in the back. There was a large quantity of blood in the retroperitoneal tissues and the abdominal cavity. After an extensive search the bullet was not found, having disappeared deep in the pelvis. There was a third small, oval penetrating wound three-eighths of an inch in diameter, at the point of the right shoulder, in the back. This wound continued downwards, backwards and slightly to the right for a distance of six inches to end in the posterior axillary fold, where a lead bullet of about 38 calibre was found in the muscles. This bullet had a linear groove, one-half inch in length on one side, which extended to the base, an oval flat groove one-quarter of an inch in length to the right

of this, and four straight oblique grooves to the left. The initial R and C will be found on the base. There was a fourth oval, penetrating wound one-half by one-quarter inch [fol. 27] at the point of the chin, extending horizontally through the soft tissues for a distance of one inch, to find exit by a similar wound. There were several small round powder marks on the left side of the face, scattered over a pattern four inches in diameter. The letters E. G. C., with clasped hands beneath them were tattooed on the under surface of the left forearm, two inches below elbow. Aside from these above described injuries, the body was that of a healthy adult male. From this examination I am of the opinion that death resulted from shock and hemmorrhage, following gunshot wounds of the abdomen.

Q. Will you step down and show the jury just where these various wounds were?

(Witness leaves the stand and does so.)

(Envelope containing bullet marked Exhibit 2.)

Q. Then, I understand, of the four wounds you found on the body, you were only able to recover one bullet as the result of your autopsy?

A. That is correct.

Q. I show you Exhibit No. 2, and ask you what that is?

A. It is the bullet I removed from the body of Edward Couch.

Q. What calibre of bullet is that?

A. It appears to me as a 38.

Exhibit No. 2 offered in evidence.

Cross-examination.

Mr. Ammon:

Q. These initials on the bottom were inscribed by you I believe.

A. That is correct.

Q. For the purpose of identification?

A. Yes sir.

Q. Doctor, before you performed the autopsy did you see the clothes that were on these dead men?

A. I did not.

Q. All that was submitted to you were the naked bodies?

A. Yes, sir.

Q. And now, doctor, you say there were powder marks on the left side of the face, scattered over a pattern four inches in diameter; would that indicate that bullet was fired at very close range?

A. That is the usual assumption.

Q. And of course bullets fired at close range through a man's clothes, the powder marks would be around the clothes instead of on the flesh and skin?

[fol. 28] A. That is the usual teaching.

Q. You didn't see the clothes on either man?

A. I did not.

Q. The only powder marks you saw in your whole examination of the five shots, were the powder marks on the left side of the officer's face and chin?

A. That was the only one.

Q. That bullet struck him in the chin, and went in sideways from left to right, is that it?

A. Yes, sir.

Q. Of course that wound wasn't necessarily fatal?

A. It was confined to the more superficial tissues, to the soft parts; it didn't strike any vital structure.

Q. And the wound you describe by illustrating on Mr. Estep's shoulder, took a vertical direction down past the clavicle or back?

A. It took a vertical direction outward, only it was in the shoulder blade,—the clavicle is in front.

Q. And that was about eight or nine inches long?

A. Six inches I think, from my recollection.

Q. That was also a superficial wound, was it?

A. Yes sir.

Q. The wounds which apparently caused death were the two wounds in the abdomen?

A. Yes sir.

Q. And do I recall your testimony correctly, that the one ball in the abdomen took a general upward course?

A. Very slighty upward.

Q. And the other one took a decidedly downward course, and lodged itself in the hip?

A. It was oblique.

Q. How far did the bullet wound that took a slightly upward course penetrate the tissues of the officer's body?

A. It went from the left wall of the belly almost across the entire width of the abdominal cavity.

Q. How many inches would you say that was, to your best judgment, doctor?

A. Well, I wouldn't know; it must have been a foot any way.

Q. Fully twelve inches?

A. I imagine,—although I can't say positively, I didn't measure it.

[fol. 29] Q. And what distance would you say the other bullet penetrated that took the downward course, and lodged in the hip, the bullet you didn't recover?

A. It was fully that long.

Q. At least twelve inches too?

A. I should imagine.

Q. It was these two bullet wounds that caused death, I presume—the wounds in the abdomen.

A. That was my idea, yes, sir.

Q. Doctor, what would be the distance from this officer's chin, where the bullet wound penetrated the jaw, down to the nearest penetration of the abdomen?

A. I am sure I don't know.

Q. You didn't measure that, did you?

A. No sir.

Q. This officer you say was five feet eleven?

A. Yes, sir.

Q. And weighed about 200 pounds?

A. About 200 pounds,—that is an approximation.

Q. A very fleshy man, was he?

A. He was a well built individual, yes, sir.

Testimony of W. H. Felix

W. H. Felix sworn.

Examination by Mr. Estep:

Q. What is your name?

A. W. H. Felix.

Q. Where do you live?

A. 44 South Howard street, Bellevue.

Q. What is your business?

A. Deputy Coroner of Allegheny County.

Q. Were you Deputy Coroner on the 30th of October, 1922?

A. I was, yes, sir.

Q. What particular duty were you performing on the early morning of October 30th?

A. I reported to work at 12:00 o'clock Midnight, and would be there until 8:00 o'clock.

[fol. 30] Q. Were you called to the North Side in your capacity as Deputy Coroner?

A. Yes, sir.

Q. Where to?

A. Presbyterian Hospital.

Q. Did you find anybody there that you afterwards took to the Morgue?

A. Yes, sir, the body of Edward C. Couch.

Q. Did you take him from the hospital to the Morgue?

A. From the emergency room of the hospital to the Allegheny County Morgue.

Q. How was he dressed at the time you took him from the hospital to the Morgue?

A. He had on a regulation police uniform.

Q. And was that uniform removed at the Morgue?

A. Yes sir.

Q. I show you the coat of the uniform that was worn by officer Couch on the night of the 30th, and ask you whether or not that is the coat?

A. It is, yes, sir.

Q. I show you these trousers, and ask you if those are the trousers of the uniform worn by officer Couch on that morning?

A. Yes, sir.

Q. I will ask you whether or not this is the shirt that was worn by the officer at that time?

A. Yes, sir.

Q. I will ask you whether or not this is the underwear that was worn by officer Couch?

A. Yes, sir.

Counsel for the Commonwealth offers in evidence the coat, trousers and underwear, identified as Exhibit No. 3.

Q. Mr. Felix, I will ask you whether or not you at any time examined that uniform, and notice the holes in it at the time you took it from him, or took it to the Morgue?

A. When removing the clothing I noticed the bullet holes, and we always save those with the preparations.

Q. Where are the bullet holes on that?

A. Right here (ind.).

Q. That is the one in the neck?

A. Yes, sir.

[fol. 31] Q. Are there any others there?

A. That is the only one I made note of, the one at the top.

Q. This bullet hole there (ind.), did you notice that at the time?

A. No, sir.

Q. You didn't notice this one in the back there?

A. No, I didn't.

Q. Did you examine the shirt that night?

A. Yes, sir.

Q. I show you this shirt, and ask you to show us the bullet hole you saw that night.

A. Those are the ones (ind.)

Q. How many are there?

A. Three.

Q. And I believe each bullet hole is surrounded by a spot of blood?

A. Yes, sir.

Q. Where did you take Couch from the hospital?

A. From the emergency room of the Pre-byterian Hospital to the County Margue.

Q. Do you know who brought Hopkins?

A. No. 12 police patrol delivered his body to the Morgue.

(No cross-examination.)

TESTIMONY OF DR. H. S. WALLACE

Dr. H. S. WALLACE sworn.

Examination by Mr. Estep:

Q. What is your name?

A. H. S. Wallace.

Q. You are a practicing physician of Allegheny County?
A. No, sir.
Q. Are you a physician?
A. Yes, sir.
Q. Are you connected with any Institution?
A. I am.
Q. What one?
A. Presbyterian Hospital.
[fol. 32] Q. Where is that located?
A. Corner of Sherman and Montgomery avenue, North Side.
Q. In what capacity are you attached to the Institution?
A. As resident physician.
Q. On the early morning of October 30th, 1922, were you at the hospital?
A. I was.
Q. Do you recall a man named Edward Couch being brought to the hospital?
A. I do.
Q. About what time was he brought there?
A. He was brought to the hospital at 1:55.
Q. And did you examine him?
A. I did.
Q. What was his condition at the time he was brought to the hospital?
A. He was in a condition of shock.
Q. Did you make any examination of his person?
A. Just in as much to find out where the bullet holes were, roughly, and no examination of the clothing other than opening it up to see what I could do.
Q. How long was he at the hospital?
A. He lived ten minutes, dying at 2:05.
Q. You were present when he died?
A. I was.
Q. Did you notice his uniform when he was brought to the hospital?
A. I just noticed it.
Q. He had a uniform on?
A. Yes, sir.

[fol. 33] TESTIMONY OF WILLIAM HELMICH

WILLIAM HELMICH sworn.

Examination by Mr. Estep:

Q. Your name is William Helmich?
A. Yes, sir.
Q. Where do you live?
A. 1418 Superior street, North Side, Pittsburgh.
Q. Did you know Thomas Hopkins?
A. Yes, sir.
Q. How long had you known him prior to October 30th of last year?
A. I should say about ten years.
Q. Did you see him in the Allegheny County Morgue?
A. Yes, sir.
Q. When?
A. The morning after the shooting occurred.
Q. That same morning, only in the day-time?
A. Day-time.
Q. Did you see Hopkins at the Morgue?
A. Yes, sir.
Q. You saw him dead?
A. Yes, sir.
Q. Did you know where he lived at the time?
A. I knew where he roomed.
Q. Where did he room?
A. On Irwin avenue.
Q. About how far from the corner of Freedmore and Irwin did he room?
A. I should say three blocks.

(No cross-examination.)

[fol. 34] TESTIMONY OF MRS. ESTELLE COUCH

MRS. ESTELLE COUCH sworn.

Examination by Mr. Estep:

Q. What is your name?
A. Estelle Couch.

Q. I believe you are the widow of Edward Couch, the deceased in this case?

A. I am.

Q. Where do you live?

A. 1423 Porterfield street, North Side, Pittsburgh.

Q. How long have you lived at that number?

A. Just five months.

Q. Where did you live on October 30th, 1922?

A. Same place.

Q. You just moved there shortly before your husband was killed?

A. In June.

Q. How long had your husband been on the police force?

A. He had been on eighteen years.

Q. And how old was he?

A. He was forty-four; he would be forty-five in May.

Q. At what time did he leave home on that particular date to go on duty?

A. 7:00 o'clock.

Q. That evening?

A. That evening.

Q. Did you know where his beat was at that time?

A. Not just exactly I didn't.

Q. Did you know it was on Irwin avenue, or in that neighborhood?

A. I know it was on Irwin avenue and Brighton Road.

Q. And how old a man was your husband?

A. He would be forty-four at the time of his death.

Q. How long had you been married?

A. We had been married nineteen years in April.

Q. After he left home at 7:00 o'clock on that night, to go on duty, when did you next see him again?

A. I didn't see him until Monday evening about 6:00 o'clock.

[fol. 35] Q. Where did you see him?

A. When they brought him to our home.

Q. When did you receive word that he had been shot and killed?

A. What, it was about four o'clock that Monday morning.

Q. It was in the morning?

A. Yes, sir.

Q. Have you any children?

A. I have four.

Q. How old is the oldest?
A. Fifteen.
Q. And the youngest?
A. Six.
Q. When your husband had left that night to go on duty, did he have his uniform on?
A. Yes, sir.
Q. Did you notice whether he had his badge on the night he left for duty?
A. Yes, sir, he had it on.
Q. Do you know where that badge is now?
A. I have it.
Q. And by whom was it given to you?
A. By Dr. Orr.
Q. And that was presented to you after he was killed?
A. Yes, sir.
Q. Did you know your husband's revolver?
A. Yes, sir.

(Revolver marked Exhibit No. 4.)

Q. I show you Exhibit No. 4, and ask you whether or not that is the gun and the holster belonging to your husband?
A. Well I have never handled it.
Q. Does that resemble the gun he had?
A. Yes, sir.
Q. You don't happen to have the badge that he wore on that night with you at the present time?
A. No, I forgot to bring it; I intended to, but I forgot it.

(Another badge shown witness.)

Q. I show you this badge, and ask you if the badge you have in your possession, and that your husband wore, is identical with this one, except the number?
[fol. 36] A. Yes, sir, identical.
Q. The same size?
A. The same size.
Q. And the same material?
A. The same material.

Cross-examination.

Mr. Ammon:

Q. Your husband has been a police officer you say for eighteen years last past?

A. Yes, sir.
Q. Continuously?
A. Yes, sir.
Q. And resided all this time on the North Side?
A. Always.
Q. How long was he on this Irwin avenue beat?
A. I can't answer.

TESTIMONY OF W. F. DETTIS

W. F. DETTIS sworn.

Examination by Mr. Estep:

Q. Your name is W. F. Dettis?
A. Yes, sir.
Q. Where do you live?
A. 1619 Antrim street, North Side.
Q. Did you know Edward Couch?
A. Yes, sir.
Q. How long had you known him prior to October 20th of last year?
A. About seven years.
Q. Did you see him in the Allegheny County Morgue?
A. Yes, sir.
Q. When?
A. On Monday morning, I don't remember the date, about 9:00 o'clock.
Q. Was it the Monday he was killed?
[fol. 37] A. It was the morning after the night he was killed.
Q. The same day?
A. Yes, sir.
Q. He was dead at the time you saw him?
A. Yes sir.
Q. Did you see him afterwards at his home?
A. Yes, sir.
Q. When he had been removed there?
A. Yes sir.

(No cross-examination.)

Testimony of Albert Brady

Albert Brady sworn.

Examination by Mr. Estep:

Q. Your name is Albert Brady?
A. Yes, sir.
Q. Where do you live?
A. 710 Taylor avenue, North Side, Pittsburgh.
Q. How long have you lived on the North Side?
A. I have lived there all my life.
Q. How old are you?
A. Thirty-five.
Q. How long have you lived on Taylor avenue at this address?
A. About three years.
Q. Before that w-ere did you live?
A. Brighton Road.
Q. Where are you employed?
A. I am employed at the Fort Pitt Bedding Company.
Q. Where is their place located?
A. On Preble Avenue, North Side.
Q. How long have you been employed at the Fort Pitt Bedding Company?
A. Since the latter part of last July.
Q. Then you were employed at the Fort Pitt Bedding Company at the time officer Couch and Thomas Hopkins were killed?
[fol. 38] A. Yes, sir.
Q. Before you were employed at the Fort Pitt Bedding Company, where were you employed?
A. At the Fort Wayne Round House.
Q. In what capacity?
A. Boiler maker's helper.
Q. Did you know Thomas Hopkins?
A. Yes, sir.
Q. And how long had you known him prior to October 30th of last year?
A. I judge about fifteen years anyway.
Q. Did you know Edward Couch, the police office?
A. Yes, sir.
Q. How long had you known him?

A. I have known him ever since he has been on that beat; I don't know exactly how long he has been on there.

Q. Where had you been on Sunday, October 29th of last year?

A. About half past ten Sunday morning I met some fellows, and we got some whiskey, and I met Tom.

Q. Who is Tom?

A. Tom Hopkins, and we had a bottle, and some more came along there and we got another bottle, and drank around there until about two or three in the afternoon. Then we met Mr. Rodgers and a man named Mr. Garvin, and there was about five of us. We went down to what we called Hunkey Pete's, and got some beer.

Q. What did you do after supper time on Sunday, up until 1:00 o'clock,—were you with Mr. Hopkins all evening?

A. Yes, sir.

Q. And at 1:00 o'clock, or 1:15 on the morning of October 30th, were you with Hopkins?

A. Yes, sir.

Q. Where had you been?

A. We were on Freedmore street.

Q. And what other cross street?

A. Irwin avenue.

Q. And who was with you at that time?

A. Mr. Rodgers, Mr. Conoran and Mr. Hopkins and myself.

Q. Where had you met Rodgers just prior to coming to the corner of Freedmore and Irwin?

A. He was with us.

Q. How long had he been with you?

[fol. 39] A. He was with us four or five hours.

Q. And Conoran?

A. We just met him.

Q. And how long before you got to the corner of Freedmore and Irwin?

A. I judge about five minutes.

Q. When you got to the corner of Freedmore and Irwin, about what time was it?

A. I can't say,—it was after midnight.

Q. How long before the shooting was it?

A. What do you mean, when I met Conoran?

Q. No, how long before the shooting was it you arrived at the corner of Freedmore and Irwin?

A. I judge about ten minutes, something like that.

Q. Tell the court and jury what happened after you got to the corner of Freedmore and Irwin.

A. Me and Tom was wrestling.

Q. You mean Hopkins?

A. Me and Rodgers and Hopkins and Conoran was standing there. Hopkins and me, we got done wrestling, and Hopkins staggered over to where Rodgers and Conoran were standing, and I was picking up my hat, and I noticed these two fellows passing, but I didn't know who they were, and didn't recognize their faces. There was something said, I don't know what it was, and Hopkins circled out over to the street and walked towards these fellows. When he was out in the street I turned around, and they were standing against the wall, they were about ten feet away from where I was standing. One fellow says "Are you looking for trouble?" And he no sooner said that than Hopkins was on a direct line with me, about eight feet from me. I stood still, and didn't know what to do, and we all stood still. And then at that time officer Couch come and bumped my arm, and his both arms were swinging and he went out to the street where Hopkins was lying. These fellows went down then, and Couch was about 100 feet from Irwin avenue and Freedmore, and they were about ten feet ahead of him. He was gaining on them all the time, and the one turned around half way and fired four shots. I started to run, and when I got even with Couch he staggered like, and he said "The dirty sons-of-bitches got me—get them." I ran down the Brighton Road, and ran out to the middle of the street, what they call the half way stop where the cars stop, and two fellows was sitting on the car. I couldn't see this one fellow yet, it was kind of dark, and then I seem him go under the light, and I hollered to those two fellows to stop. By the time I got up that far [fol. 40] someone asked what was wrong and I told them they had shot two men down there. I went to Freedmore and Washington, and to Columbus, and Brighton Road and I couldn't see nobody. I come back down, and when I got to Freedmore street there was Couch laying on the payment on the broad of his back. There was one man

there, a barber, and they raised him up, and he says "Let me Lay down," and he looked around this way (ind.) and said "Let me lay down." I run to where Hopkins was and I looked at him, and I knew he was dead, and I stayed around there until they took me down to the hospital and down to the jail.

(Photograph marked Exhibit 5.)

Q. I show you Exhibit 5, and ask you if you know what that is a photograph of?

A. That is a photograph of where we was wrestling on Freedmore street.

Q. Does that show the corner of Freedmore and Irwin avenue?

A. Yes, sir.

Q. Does that show the place where you four fellows were standing at the time Hopkins was shot?

A. Yes, sir.

Q. Does it show the spot where Hopkins fell?

A. Yes, sir.

Q. Will you mark the spot where Hopkins fell with the letter "A"?

(Witness does so.)

Q. Does that photograph show the place where the defendant was standing at the time he fired the shot that killed Hopkins?

A. Yes, sir.

Q. Mark that with the letter "B."

(Witness does so.)

Q. Does that show the corner upon which you fellows were standing when these two men passed you?

A. Yes, sir.

Q. Mark that with the letter "C."

(Witness does so, marking the corner.)

(Witness leaves the stand and shows photograph to the jury.)

Q. When you put that letter "B" on there, indicating where these two men were standing up against the side of that building, do you mean by that that the two men, Val-

otta and the man with him, were standing next to the building?

A. They were standing flush against the building, one beside the other.

Q. What was the condition as to the light or shadow at the particular point where Valotta and his friend were standing against that building?

[fol. 41] A. It is pretty dark there at any time.

Q. What makes it dark?

A. There is only one light on the corner there, that I know of.

Q. The light is located where?

A. There was one down McCullough street.

Q. I mean on Irwin?

A. I think that is up Armandale street.

Q. If it was the corner of Armandale and Irwin, would the house standing on the corner of Freedmore and Irwin interfere with the light showing on Freedmore?

A. Yes, sir.

Q. How far would you say Hopkins was standing out in the street from the point where these two men were standing next to the wall of the house?

A. About eight feet, I judge about eight feet.

Q. And these two men, were they standing close together at the time Hopkins was shot?

A. Yes, sir, as far as I could see.

(Photograph marked Exhibit 6.)

Q. I show you Exhibit 6, and ask you if you know what that is a photograph of?

A. That is a photograph of Freedmore street.

Q. Does that photograph show the corner upon which you were standing at the time this defendant turned the corner?

A. That shows the corner of Irwin and Freedmore.

Q. And does it show the place where Hopkins fell?

A. Yes, sir.

Q. And does it show the place where the man was standing that fired the shot that killed Hopkins?

A. Yes, sir.

Q. Does it show more of Freedmore street than the one I just showed you, Exhibit 5?

A. Yes, sir.

Q. Does that photograph there show where Couch was at the time he was shot?

A. Yes, sir.

Q. Just mark the letter "D" at the point where Couch was when he was shot.

(Witness does so.)

Q. Does that photograph, marked Exhibit 6, show where the man who did the shooting of Couch was located, or standing at the time he shot?

[fol. 42] A. Yes, sir, about in there (ind.).

Q. Were they standing against the house that faced Irwin avenue, or had they passed the house at the time they shot at Couch?

A. They were running down the pavement.

Q. Had they passed the rear of the house that stood on the corner?

A. No, sir.

Q. They hadn't?

A. No, sir.

(Photograph marked Exhibit 7.)

Q. I show you Exhibit 7, and ask you what that is a photograph of?

A. It is a photograph of McCullough street and Freedmore street.

Q. The street that you see the most of, what street is that?

A. Freedmore.

Q. Does that show the location that this man was in at the time he shot Couch?

A. It shows that, yes, sir.

Q. Mark that with the letter "E,"—where the two men were at the time the shots were fired that killed Couch, mark it with the letter "E."

(Witness does so.)

Q. Now, does that photograph show the place that Couch was at the time he was shot?

A. Yes, sir.

Q. This is just about in back of that automobile (ind.)?

A. Yes, sir, just outside of the automobile.

Q. Where was Couch at the time you came back, after tracing these men, or one of the men, and saw Couch lying on his back?

A. Why, he was I judge about 40 feet from Brighton Road.

Q. How far was he about from where he had been shot in the first instance, how far had be gone?

A. About 90 feet I judge.

Q. Do you know where McCullough street is?

A. Yes, sir.

Q. That is the next street from Freedmore—the next street from Irwin.

A. Yes, sir.

Q. Where is McCauslin street?

A. Just down over on the other side of Brighton Road.

[fol. 43] (Photograph marked Exhibit 8.)

Q. I show you Exhibit 8, and ask you if you know what that is a photograph of?

A. This is a photograph of Freedmore street.

Q. Between what streets?

A. Between Brighton Road and McCullough.

Q. Does that show the point where you saw Couch lying on his back, after you came back from chasing these men?

A. Yes, sir.

Q. Then Brady, you would say that officer Couch, after he left the spot where he was shot, had gone at least 90 feet on up Freedmore street in the direction that the men ran that had shot him, is that right?

A. Yes, sir, about that.

Q. At the corner of McCullough and Freedmore street-how is the lighting?

A. There is a light right there—I am not sure—but I judge there is a light right there.

Q. I show you Exhibit 8, and ask you if that shows an electric light at the corner of McCullough and Freedmore?

A. I guess this is it up here (ind.)

Cross-examination.

Mr. Ammon:

Q. What is your age?

A. Thirty-five.

Q. On the first day of July, 1922, you were working in the shops of the Pennsylvania Railroad?

A. Yes, sir.

Q. And about the 6th of July you quit work?

A. Yes, sir.

Q. You went out on a strike?

A. I just quit.

Q. You didn't go out on a strike?

A. No.

Q. There was a strike called on the 1st?

A. Yes, sir.

Q. And you quit because your friends went on strike?

A. I quit because the conditions weren't good?

Q. You had seen that man working in the shop before that (indicating the defendant)?

[fol. 44] A. In the machine shop.

Q. You knew him to see him?

A. Yes, sir.

Q. He had been working there six or seven years?

A. I don't know.

Q. How long did you work in the machine shop before you went out on the 6th of July, 1922?

A. I didn't work in the machine shops.

Q. Where did you work?

A. In the round house.

Q. How long did you work there before July 6th, 1922?

A. I worked before that in what they call the tank shop and round house for two years and a half.

Q. And you worked there before that time once before, didn't you?

A. I worked there pretty near six months.

Q. You saw this man there at that time, and knew him to see him?

A. I wouldn't say, no, sir.

Q. But the second time you knew him to see him as a machinist's helper?

A. Yes, sir, he used to be there Sunday.

Q. As a machinist's helper?

A. I didn't know what he was.

Q. Now, you worked in the round house?

A. I did, yes, sir.

Q. Armandale street runs into Irwin avenue?

A. It is a little on the side, yes, sir.

Q. And then there is a little bit of a right angle up Irwin avenue until you come to Freedmore street?

A. Yes, sir.

Q. And at this particular corner, that you indicated that brick wall there, that is occupied by Mrs. McFadden the dressmaker?

A. I don't know.

Q. Didn't you see the sign on the door?

A. I never took that much notice.

Q. Opposite Freedmore street, on the same side, is the Presbyterian Church?

A. Yes. sir.

[fol. 45] Q. And right at the mouth of Freedmore street there is a lot of dwelling houses facing Freedmore street,—Freedmore street comes before Irwin avenue?

A. Yes, sir.

Q. Then right op-osite the mouth if this street there is a lot of dwelling houses,—bricks?

A. On Irwin avenue?

Q. Facing Irwin?

A. Yes, sir.

Q. Then there is an electric light down more toward the corner of Armandale, closer to Armandale than it is to Freedmore, the electric light?

A. I couldn't say, I never took that much notice.

Q. But you know it is an arc lamp?

A. Yes, sir.

Q. When that arc lamp is burning, the front and the angle of the brick house at the corner of Freedmore and Irwin throws a shadow on Freedmore street?

A. Yes, sir.

Q. So when these two men got past a certain point on Freedmore street they were in the shadow?

A. Yes, sir.

Q. Then as you come down Freedmore street you come to an alley known as McCullough Alley?

A. McCullough street.

Q. That runs at right angles to Freedmore?

A. Yes, sir, it crosses Freedmore.

Q. And when you come to the next street running parallel with Irwin and McCullough street, it is Brighton Road?

A. Yes, sir.

Q. And a short square down from that is what is called Marquis Street?

A. Yes, sir.

Q. And there is a long fence there, or wind where the Pennsylvania Yards and shops and switching places are?

A. Fence along there.

Q. How many acres do you think would be occupied by the Pennsylvania Railroad?

A. I couldn't say.

Q You worked in the Round House for two years and a half?

[fol. 46] A. No, I didn't work in there that long. I just forget when I went to the Round House. They laid me off, and I had a chance for a job down at the other place.

Q. There are about 100 to 200 engines there, actively pumping all the time?

A. No, there is 48 stalls in the Round House.

Q. About 100 or 200 engines pumping all the time?

A. I wouldn't say how many there are.

Q. And a constant volume of smoke coming from the property of the railroad down towards Irwin Avenue from Marquis Street?

A. Sometimes there is, yes, sir.

Q. That is the natural way the drift blows, isn't it?

A. They built that stack for that—I don't know.

Q. What was the condition of the night on this particular night when this shooting occurred?

A. The night was foggy, as far as I know.

Q. It was foggy?

A. Yes, sir.

Q. Was the fog dense?

A. It wasn't just dense, it was starting to get foggy.

Q. Was it 1:00 o'clock in the morning?

A. Somewhere around there, I don't know exactly.

Q. It was after midnight?

A. It was after midnight.

Q. Was there much smoke coming up from the yards of the Pennsylvania Railroad?

A. I didn't notice whether there was smoke or not.

Q. It was pretty foggy?

A. It was pretty foggy.

Q. This man continued to work on after July in the shops?

A. I don't know that.

Q. Now, what time did you start to drink whiskey that morning?

A. About half past ten.

Q. Do you mean Sunday morning?

A. Sunday morning.

Q. Had you been drinking the night before?

A. No, sir.

Q. Who did you start drinking with at half past ten in the morning?

A. Hopkins and a couple of other fellows.

[fol. 47] Q. You went to Pete Cash to get the whiskey?

A. Yes, sir.

Q. And Pete's place, where you bought the whiskey, is on Brighton Road, around the corner from Freedmore Street?

A. It is on Brighton Road, about seven doors away from Freedmore towards town.

Q. Towards town or the hill?

A. Towards town.

Q. How much whiskey did you and Hopkins get there at half past ten in the morning?

A. The first time we got a pint.

Q. How much did you pay for it?

A. $1.50.

Q. It wasn't bonded whiskey?

A. No, sir.

Q. Moonshine?

A. Yes, sir.

Q. White mule?

A. Either white or dark.

Q. And did you and Hopkins then drink that pint of whiskey?

A. Me and a couple of more fellows.

Q. Where did you drink it?

A. In the alley there.

Q. What Alley, McCullough?

A. No, this alley that runs from Irwin down to the light plant.

Q. Why didn't you drink it in Pete's place?

A. He wouldn't allow you, he didn't want anyone to drink in there.

Q. You finished that pint, you and Hopkins and a couple of more fellows?

A. Yes, sir.
Q. When did you get your next whiskey?
A. We was getting it all day long.
Q. Tell us when you got the next installment of liquor.
A. When we was up there we got the beer.
Q. We haven't come to the beer yet; we are still talking about white mule.
A. I don't know how much we got, I didn't keep count.
[fol. 48] Q. Was it an hour afterwards you got the next installment?
A. It may have been.
Q. Was Hopkins still with you?
A. Yes, sir.
Q. You got whiskey about an hour afterwards?
A. Yes, sir.
Q. Where did you drink that?
A. In the same alley.

(Change of reporters.)

Mr. Ammon:

Q. You got the next installment then about half past eleven?
A. Well, it was somewhere around that.
Q. You drank that in the alley?
A. Yes sir.
Q. Hopkins helped you to drink that?
A. Yes, sir.
Q. When did you get the next installment?
A. I couldn't tell you that.
Q. How many pints did you buy that day, you and Hopkins?
A. I couldn't say how many. It was quite a few.
Q. Would you say you had bought a half a dozen pints or a dozen?
A. We bought a half a dozen anyway.
Q. And you bought some beer in the same place, did you?
A. Yes, sir.
Q. And you have been buying in Pete's place for some time?
A. Yes, sir.
Q. You and all the rest of your crowd?
A. Yes, sir.

Q. Anybody that had the money?
A. Anybody had the money.
Q. He could sell it too?
A. He would sell it too.
Q. Is that the fellow they call Hunkey Pete?
A. That's what we call him, Hunky Pete.
Q. Pretty well known to the police?
[fol. 49] A. No, not as I know of. He never was arrested.
Q. That is that you know?
A. That I know, yes.
Q. Now that drinking, then, kept up until one o'clock the next morning, Monday morning, did it?
A. Yes. We went down to Tommy's room and played cards, and quit and came out and got something to eat and went back in and came out again.
Q. You went and played penny ante some place?
A. In Tommy's room.
Q. And you drank up there?
A. Yes.
Q. And you drank so much that finally old Hunky Pete wouldn't sell you any more, didn't you?
A. Well, he wouldn't sell us any more the last time in.
Q. Because you were all full?
A. Well, I don't know. He said he didn't have no more.
Q. Cleaned him out, had you, you fellows?
A. Well, we weren't the only ones went up there.
Q. Now we get down to one o'clock in the morning, as near as you can remember, at the corner of Irwin avenue and Freedmore street, and you were wrestling with Hopkins?
A. Yes, sir.
Q. What were you fighting about?
A. We were monkeying fooling.
Q. Monkeying?
A. Yes.
Q. You had been talking loud at that corner?
A. Well, Tommy stutterred, he always——
Q. I say you were making a loud noise at that corner?
A. We weren't making so much noise. They were laughing about us wrestling.
Q. Wrestling and talking loud and you were singing?
A. We were signing before we reached there.
Q. Didn't you disturb the neighbors two blocks away?

A. I don't know.

Q. Well, did Tom have you down on the pavement, or did you have him?

A. We were both down on the pavement.

[fol. 50] You were wrestling for about ten minutes?

A. No, it couldn't have been that long.

Q. How long?

A. I judge about three or four minutes.

Q. And you were down on the pavement about the time that Valotta and his friend came out of Irwin avenue from Armandale street?

A. No, we weren't. We had quit wrestling.

Q. At the time those men came around, was there one or more of you on the pavement?

A. Well I was standing up. I had my hat, brushing my hat off.

Q. Was Tommy down on the pavement?

A. No, sir. He was up talking to Rodgers and Conoran, and they were laughing.

Q. You were what?

A. He was talking to Rodgers and Conoran.

Q. And these men took a detour around you so that they wouldn't get near you, didn't they?

A. No, sir. They went right between us.

Q. Well, they didn't take the pavement?

A. Yes.

Q. They took the street, didn't they, first?

A. No, sir.

Q. Weren't they on the surface of Freedmore street instead of the sidewalk, trying to get around you fellows?

A. No, sir.

Q. What did Tommy Hopkins say to these men?

A. I don't know what he said, anything.

Q. Well, about two or three minutes before Valotta and his friend came along, didn't Couch this very policeman that was shot, stop at the corner there?

A. No, sir.

Q. Didn't he tell Hopkins to go home, that he was full?

A. No, sir.

Q. Did you see Couch there at all?

A. No, sir.

Q. You didn't?

A. Not on that corner, no.

Q. What corner did you see him on?

[fol. 51] A. Seen him at Irwin avenue and Pennsylvania avenue.

Q. How long before this?

A. Maybe about a half an hour, three quarters before that?

Q. Don't you know Mr. Brady, that within five minutes before Hopkins was shot, that Officer Couch came right down to Mrs. McFadden's corner, the brick house there where you boys were wrestling, and told Hopkins to go home, that he had too much booze in him, and then he went down Irwin avenue, and when the shot was fired ran back from Irwin avenue and came down Freedmore street before he was shot?

A. No, sir.

Q. You don't remember that?

A. He wasn't there.

Q. Where did he come from?

A. He came up Irwin avenue, but he wasn't there, he didn't tell us to go home right there. He told Tommy to go home down at Pennsylvania and Irwin aveune.

Q. He told who to go home?

A. Tommy, down at Pennsylvania and Irwin.

Q. How far is that away?

A. Two squares.

Q. How long before?

A. About three-quarters of an hour before that.

Q. How many were in the crowd down there?

A. Lee Rodgers and Foster and Savage. I don't know how many. There is a restaurant right at the corner.

Q. Were you making a noise down there?

A. No, we wasn't. Standing on the corner.

Q. Were you si-ging?

A. No. We was standing there.

Q. Talking loud?

A. No.

Q. At the that this man fired the shot, his back was to the wall of the house, wasn't it?

A. Yes, sir.

Q. Right near a coal door there?

A. Right somewhere around there.

Q. Your friend Hopkins was eight feet in front of him?

A. Yes, sir.

Q. And he was making a demonstration with his fists?

A. Well, I don't know. He might have. He was walking towards him, anyway.

[fol. 52] Q. And he was making a demonstration with his fists, using his fists at him?

A. That's the way he walked, I guess.

Q. Do you mean to say Hopkins walked this way (indicating)? That's the way he was walking towards these two men with their backs to the wall, with his fists that way?

A. Well, he was walking. I wouldn't say whether his fists was going or not.

Q. You wouldn't say they weren't, would you?

A. No, I wouldn't say they weren't.

Q. Didn't your friend Hopkins call this man a Guinea scab?

A. No, sir; there was no such thing.

Q. What was said?

A. The only thing I knowed was said was that he said, "Are you looking for something?"

Q. Didn't you say a while ago that you heard Hopkins say something but you couldn't tell what it was?

A. He stuttered, yes.

Q. What was he saying?

A. He was stuttering. He didn't say anything.

Q. Didn't he call this man a Hunky scab and say "I am going to finish you, I am going to kill you?

A. No, sir.

Q. Didn't this man try two or three times to persuade the man to go away?

A. No, sir.

Q. He wouldn't go, and got close to him, that's when this man pulled his gun and shot?

A. He never gave him a show at all.

Q. Where were the rest of your gang when this man Hopkins was going forward this was (indicating) towards these men with their backs to the wall?

A. They all stood there.

Q. How far away?

A. Away from where?

Q. From where Hopkins was?

A. Why, about ten feet from the time he got front of that man.

Q. Ten feet away?

A. Yes. That was on the corner.

[fol. 53] Q. Then this man started to run, did he?

A. Both of them started to run.

Q. After Hopkins was shot?

A. They started to run, both of them.

Q. When Hopkins was shot, what direction was his head with relation to the curb near there when he fell? Were his feet towards this man when he fell, or his head?

A. His head.

Q. Head was towards him?

A. Yes.

Q. Did he fall forward on his face?

A. His head went down and his feet kicked in the air, and he turned a somersault, he twisted in the air and his leg was up like that (indicating) when he was laying on the ground.

Q. When he finally got quiet, he was on his back?

A. He was dead, I guess.

Q. Right after he got shot, he first fell forward towards these men, is that it?

A. Towards them men.

Q. Then when he fell down on his face, you say he twisted around some and got on his back?

A. He twisted in the air.

Q. Then when he came down finally to the surface, with his head towards these men?

A. Towards them men.

Q. His feet toward the church?

A. Yes, sir.

Q. And about eight feet away from Valotta?

A. I would judge about eight feet, somewhere around there.

Q. How far would the top of his head be away from the curbstone?

A. About three feet.

Q. And the sidewalk there is about three feet wide?

A. Five foot.

Q. About a five foot sidewalk?

A. Yes, sir.

Q. And you are sure that these two men, before they [fol. 54] fired the shot, both had their backs against the wall near the coal hole?

A. Yes, sir.

Q. You are positive of that?
A. Positive.
Q. Now, you say it was very foggy?
A. It was foggy.
Q. How far could you see in that fog?
A. How far could you see?
Q. Yes.
A. Well you could see all the way down the street, but you couldn't make out anybody you didn't know.
Q. How far could you discern anybody through that fog that night or morning?
A. I didn't understand you.
Q. How far could you distinguish a person?
A. Why, you couldn't distinguish them ten feet away if you didn't know them.
Q. Then you say it was so foggy that you couldn't distinguish a person from where you are sitting to here, ten feet about, is that right?
A. You could tell there was somebody there, but you couldn't recognize anybody, unless——
Q. Couldn't recognize anybody?
A. No, sir.
Q. And you couldn't see whether a man had a uniform or not ten feet away, could you, that morning?
A. You could out in the street, but not against the building, you couldn't, no.
Q. There was a fog there and was also a shadow cast by the electric light on Irwin avenue?
A. The building is tall and throws a shadow down by the *payment*.
Q. When did you first see this officer, Couch, coming around the corner of Irwin avenue into Freedmore Street?
A. Why, it was about five or six seconds after Tommy was shot.
Q. Five or six seconds after the shot was fired that killed Hopkins?
A. Yes, sir.
[fol. 55] Q. And he brushed your coat or arm?
A. Hit me on the elbow, brushed past me.
Q. That's how you knew it was an officer?
A. Yes, sir.
Q. Because he was so close to you?

A. No. I seen his uniform.

Q. After he got ten feet away from you, you couldn't discern who it was, whether it was an officer or not.

A. After what?

Q. Got ten feet away from you.

A. I knowed he was an officer when he went past me.

Q. If he had got ten feet away and you hadn't known who it was, you couldn't have told who it was could you?

A. You couldn't have told. You could out in the middle of the street. You couldn't against the wall there.

Q. Well, these men were not together? Valotta was running first, wasn't he?

A. Yes, sir, I think so.

Q. How far was he ahead of the other man?

A. Why, they were only about five foot apart.

Q. Five foot apart, and they were both heading down towards McCullough Street and Brighton Road.

A. Yes, sir.

Q. How far were they ahead of the police officer at the time he brushed you on the elbow?

A. They were about twenty feet ahead of him.

Q. And of course at that time you couldn't see these men on account of the fog, could you, very well.

A. I couldn't see these men?

Q. At twenty feet, you couldn't distinguish them very well.

A. After the officer passed me, I started to run.

Q. Then when the officer got down towards McCullough alley, the shooting started again. Is that it?

A. No, sir.

Q. What was the position of Valotta and the officer at the time the second shooting began?

A. The officer was out a little, about the middle of the street or more on to the right hand side of the curb.

[fol. 56] Q. Towards the Presbyterian church?

A. Yes, sir.

Q. Where was Valotta at that time?

A. They were running on the pavement.

Q. Was he up to McCullough alley yet?

A. No.

Q. You say he was about ten feet ahead of the officer?

A. After he was shot, he was gaining on them, and he gained about ten feet on them.

The Court:

Q. The officer gained ten feet?
A. Yes.
Q. Then they were running down the street?
A. Running down the street.
Q. How far from the corner of Irwin avenue and Freedmore street had these men gone down Freedmore street before the shooting started again?
A. Why, they went, I judge, about a hundred feet, where he got shot, from Irwin avenue.

Mr Ammon:

Q. Where did the first ball hit the officer?
A. I don't know.
Q. After he was shot the first time, did he get down on his knees, the officer?
A. They were quick shots. He was shot three times right straight following.
Q. Quick shots?
A. Yes, sir.
Q. I suppose they weren't a second apart?
A. They were very close. I couldn't tell, but they went quick anyway.
Q. Did the officer fall down on his knees?
A. He didn't go complete down, no. He went down on one knee like, and that's when I caught up close to him, he was bringing his body up that way.
Q. Let me understand this. He was shot before he reached McCullough alley crossing Freedmore, wasn't he?
A. Yes, sir.
Q. Well did the first shot bring him down to his knees?
[fol. 57] A. No, sir. He went down on his knees after the four shots were fired.
Q. Oh, then he got all four shots in his body before his knees began to sag?
A. Yes, sir.
Q. And you say from the time that the shots started and he was struck the first time, he went a distance of ninety feet?
A. He went a distance of ninety feet after he was shot four times.
Q. He went a distance of ninety feet after he was shot

four time-, and his body finally fell on Freedmore street on the sidewalk over towards Brighton Road?

A. Yes, sir.

Q. Now, at that time where was Valotta, when the shooting went on?

A. Valotta?

Q. Yes.

A. Who do you mean? That gentleman there?

Q. This gentleman.

A. Why, he was running on the pavement when he shot the officer.

Q. What pavement? On the left side?

A. On the left side, yes.

Q. That is where all four shots were fired?

A. Yes, sir.

Q. Well, where did Valotta and his friend run to after the shots were fired?

A. They got off the pavement on McCullough street and ran down the middle of Freedmore street and hit Brighton Road, and I lost track of both of them until I seen one of them——

Q. How is that? You lost track of them where?

A. Brighton Road and Freedmore.

Q. Then you came back?

A. No. I seen the one going up into the alley by Brighton Road, what they call the half way stop.

Q. Where did the other man go?

A. I don't know where he went. I couldn't say.

Q. What position was the body of Officer Couch in when you got back from your chase?

A. He was laying on his back with his head towards the fence.

[fol. 58] Q. And his feet out?

A. Out over the curb, yes.

Q. And he said to you when you got up to him——

A. He didn't say nothing to me.

Q. Well you heard him say, "The son of a bitch has got me. Get them?"

A. No, He said, that when he got shot.

Q. How?

A. He said that when he got shot.

Q. "The son of a bitch has got me. Get them" Is that what he said?

A. Yes, sir.

The Court:

Q. That's what he said to you when you caught up to him.

A. When I got about even with him, when he was shot.

Q. When he fell over?

A. No. He said it before he crossed McCullough street, he said that when he was going down and bringing himself up.

Mr Ammon:

Q. How far had he run when he made that exclamation? How far had he run after he was shot?

A. Why, that ninety feet where he was laying when I came back.

Q. That's where he said these words?

A. No. He said that before that, before he went on the pavement.

Mr. Estep:

Q. He said that to you when you passed him at the time that he was shot?

A. Yes, sir.

Q. And then when you came back from your chase, he was about ninety feet up Freedmore Street from the place where he had been shot?

A. Yes.

[fol. 59] Q. Now, Mr. Brady, you were with Mr. Edeburn and Mr. Morgan and myself and Mr. Gardner on Saturday morning when we were over on Freedmore and Irwin avenue to make certain measurements?

A. Friday morning, yes, sir.

Q. And you pointed out various places that you pointed out on the exhibits over here?

A. Yes, sir.

Q. Mr. Brady, when you were running up Freedmore after Hopkins had been shot and after Officer Couch had passed you, could you see Officer Couch when he was shot and went down on his knees?

A. Yes, sir.

Q. How far away from him were you then, when he went down on his knees?

A. I guess I must have been about fifteen feet behind him.

Q. How far?

A. Oh, about—I was about, say, ten feet, across the street like, and about ten feet behind him.

Q. You were on the sidewalk then, were you?

A. Yes, sir.

Mr. Estep: I offer in evidence Exhibits 5, 6, 7 and 8.

Mr. Ammon: No objection.

Mr. Ammon:

Q. How long had you known Hopkins?

A. I judge about fifteen years.

Q. What was his occupation?

A. He drove a basket wagon.

Q. He worked in the Pennsylvania shops on Marquis Street once, didn't he?

A. I think he did work in the foundry at one time.

Q. Yes. Pennsylvania Railroad shops?

A. Yes, sir.

Mr. Estep:

Q. When was that, if you know?

A. Well, that has been about—oh, ten years or more.

[fol. 60] TESTIMONY OF WILLIAM RODGERS

WILLIAM RODGERS, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. What is your name?

A. William Rodgers.

Q. Where do you live?

A. 1517 Boyle Street, North Side, city.

Q. How long have you lived on the North Side?

A. Well, ever since I have been in Pittsburgh. I have been here about eight years, I guess.

Q. And have you lived on Boyle street during all that time?

A. Well, not all the time, no sir, but most of the time.

Q. What is your occupation?

A. Work in the Fort Pitt.

Q. How long have you been working for the Fort Pitt?

A. About five years.

Q. Then you were working at the Fort Pitt Bedding Company on October 30th of last year?

A. Yes.

Q. Did you know Thomas Hopkins?

A. Yes, sir.

Q. How long had you known him?

A. Oh, around five years, I guess.

Q. Did you know Officer Couch, Edward Couch?

A. Well, no, not personally, just to see him.

Q. Now, were you with Thomas Hopkins on the evening of October 29th and the early morning of October 30th of last year?

A. Not in the morning, no, sir.

Q. I said in the evening of the 29th and the early morning of the 30th?

A. Yes, sir.

Q. What time did you meet Hopkins on the evening of the 29th?

[fol. 61] A. Well, I met those boys in the afternoon around three o'clock, down where I am boarding.

Q. Were you with them from the time you met them at three o'clock up until the time of the shooting?

A. Yes, sir.

Q. Were you at the corner of Freedmore and Irwin avenue about one o'clock in the morning of October 30th?

A. Yes, sir.

Q. Where had you been just prior to coming to the corner of Freedmore street and Irwin avenue?

A. Well, we came from the restaurant down on the corner of Pennsylvania and Irwin avenue.

Q. And Freedmore Street and Irwin avenue, North Side, is in the City of Pittsburgh?

A. Yes, sir.

Q. County of Allegheny? When you arrived at the corner of Freedmore and Irwin, who was with you?

A. Well, there was just Brady and myself and Hopkins.

Q. Did you meet anybody else on your way to the corner?

A. No. We were standing there and this Mr. Conoran

and a young man came along; and he stopped and the other gentleman went on up Irwin avenue, and that left the four of us.

Q. About how long before the shooting was it that you arrived at the corner of Freedmore and Irwin?

A. Well, I have an idea we was there a quarter of an hour or something like that.

Q. How long before the shooting was it that Conoran joined you?

A. Probably he was there ten minutes or something of that matter.

Q. After you got to the corner of Freedmore and Irwin, just tell the Court and jury what occurred at that corner after you arrived?

A. Well, Brady and Hopkins were playing there, wrestling, and they wrestled there for three or four minutes, I guess; and about the time they got through, two young men came along.

Q. Were there two?

A. Conoran and this other gentleman. I don't know who he was. He didn't stop. And we got to talking, and in the meanwhile, we was talking, these other fellows came along.

Q. What other fellows?

[fol. 62] A. Valotta and his friend. And I was standing talking to Conoran, and I had my back to these men when they passed.

Q. Do you know where they came from?

A. I can't say whether they came up Irwin avenue or came from that street across.

Q. That would be Armandale?

A. Yes.

Q. They came from the direction of Armandale?

A. I think so. They passed us, and Hopkins made some remark. He king of stammers in his speech, and he was saying—I don't know what he said; but anyway these men kept on going when he made this remark, and they walked down street maybe fifteen or twenty feet; and Hopkins staggered off the curb out into the center of the street and hollered, "Hey, hey," a couple of times, and he was staggering towards them, and one of these fellows said, "What are you looking for? Trouble?" And no sooner he said that than he pulled out the gun and shot and Hopkins went down.

Q. About how far from where this man was standing was Hopkins when he was shot?

A. Well, I judge it to be around eight or ten feet, something like that.

Q. Did Hopkins have any revolver or any weapon in his hand.

A. No, not as I know of. I never saw him with a gun in my life.

Q. Was that all that you heard said, when he called "Hey, hey" to them?

A. Only he muttered something when they was passing. I don't know what he said.

Q. What happened after Hopkins was shot and went down?

A. Well, just about that time, maybe thirty seconds, Mr. Couch turned the corner and started towards these men. They were running. He took across to the right of this Freedmore Street, over next to the curb.

Q. That is the curb opposite the curb you were standing on?

A. Yes. And these fellows fired at the officer; and as the first shot hit him, he went on a piece, and it looked like he went down on one knee; and then they shot three times after that and I think the cop went down on his knee on this side of that little McCullough street towards Irwin avenue, and then after they kept shooting, he went on beyond this little alleyway, this McCullough street and then when he went down he didn't get up any more.

Q. You mean he staggered up after he went down on his knee and went on after them for some distance?

A. Yes, sir.

[fol. 63] Q. Did you see him after he had finally fallen and didn't get up any more?

A. Yes, sir. We ran up to him.

Q. Where were these two men at the time you ran up towards him?

A. They were running down Freedmore street towards Brighton Road.

Q. Did you run after them?

A. After we ran up to the officer and the officer said, "Get him boys. They have got me," or some such remark like that, and we took after these fellows.

Q. Where did you run to?

A. We ran down as far as the Brighton Road, and one of these fellows cut across the street from the left hand side to the right and we lost him, but the other, he was like he was puzzled whether to go straight or go up Brighton Road; he made a big circle and went up Brighton Road. Wen we got down to Brighton Road, he was quite a bit ahead of us, and we went up very near as far as Columbus avenue, and we lost him. He turned down one of those streets to the left there.

Q. About how far from the corner of Irwin avenue and Freedmore street had Officer Couch run when he was shot and went down on his knee?

A. Well, I couldn't say the distance. I think he was between McCullough street there and Irwin avenue, near that alleyway, near McCullough street, when he went down there.

Q. Could you see Officer Couch as he ran up toward McCullough street?

A. Yes, I could see him.

Q. Do you know whether or not there is a light at the corner of McCullough and Freedmore, electric light?

A. Yes, I think there is.

Q. Where were you standing at the time that he went down on his knees?

A. We were there near the corner of Irwin and Freedmore.

Q. Just give us an estimate as close as you can come as to the number of feet he was away from you when he went down on his knees?

A. Number of feet he was away from us?

Q. Yes.

A. Well, when he went down he was cater-cornered down the street that way; I expect he was about twenty or twenty-five feet from us.

Q. And you could see him as he went down, could you?

A. Yes.

[fol. 64] Q. Then did you run up past him, or was he ahead of you all the time until you arrived at where he finally fell?

A. He was ahead of us.

Q. Did you notice where the two men were that fired at Couch?

A. Well, they were on the left hand side of Freedmore going down toward Brighton Road.

Q. Were they on the sidewalk or out in the street?

A. On the sidewalk.

Q. And the place where they were on the sidewalk, was that in the light or in the shadow?

A. Well, that was kind of shaded there.

Q. Could you see them at the time they fired at Couch or just hear the report?

Q. Oh, I could see them, yes.

Q. They were about how far from you?

A. When they fired at the officer, you mean?

Q. When they fired at the officer.

A. Well, they were between ma-be twenty feet from the corner, or something like that.

Q. From the corner of McCullough?

A. No, from Irwin avenue.

Q. How far were they from the corner of Irwin when they fired at Hopkins?

A. Well, I expect they was about ten feet or something like that.

Q. Did you see Gouch as he turned the corner off Irwin on to Freedmore and chased after these men?

A. I looked around just as he was coming around, yes, sir.

Q. Did you know who he was as he passed you?

A. I did not, no.

Q. Did you know he was an officer?

A. Well, I—I couldn't—I didn't recognize his uniform, because I didn't pay that much attention, you see; little bit excited, you see, and I didn't pay that much attention. I couldn't say whether he had on a uniform or not.

Q. Did you see the uniform after you saw him lying on his back up near Freedmore at McCullough?

A. Well, we were up to him, he had on a uniform, I'm pretty sure; but I didn't recognize him when he turned the corner on the run there.

[fol. 65] Q. Did you recognize him as he lay on the street at Freedmore Street?

A. Yes, sir.

Q. Did you know he was Officer Couch?

A. Just to see him.

Q. You didn't know what his name was?

A. No, sir.

Q. You didn't know what his name was until after he was killed?

A. No, sir.

Q. What kind of night was it?

A. Oh, this night was kind of dark and foggy.

Q. Well, how far away could you see up Freedmore street with the aid of the electric light?

A. That is, to recognize anybody?

Q. Well, if you knew John Smith coming down how far could you recognize John Smith away if you knew him?

A. Oh, I expect twenty feet, something like that, maybe.

Q. How was the light at the corner of McCullough and Freedmore, the electric light?

A. Well, it was burning.

Q. And if you saw a man at the corner of McCullough and Freedmore street- in the rays of the electric light there could you recognize him?

A. Yes, if you was close enough to him.

Q. Well, if you were standing down the street some distance, at the corner of Irwin, say, and Freedmore, and saw a man under the electric light that you had known for some previous time, could you recognize him?

A. Yes, I think you could recognize him.

Q. You could recognize him?

A. I think so.

Q. That is a distance of a hundred and seventy-seven feet from the corner of Irwin Avenue to the corner of McCullough street?

A. I don't know the distance.

Q. So you could see Couch very plainly during all the time he was running up the street and at the time he was shot and after he was shot?

A. Oh, yes; I could see him, yes.

[fol. 66] Q. Did you look at Hopkins as he was lying on the street after the shooting?

A. Before the officer was shot, you mean?

Q. Yes.

A. No. We run right past Hopkins when the officer was shot.

Q. You saw him on the street?

A. I saw him laying there, yes, sir.

Q. Did you come back to where Hopkins was after the shooting?

A. Yes, sir.

Q. What was his condition then?

A. Well, he was laying maybe three or four feet with his head toward the curb on the side of the street where these men did the shooting.

Q. He was dead, was he?

A. Well, I couldn't tell. He was laying there very quiet, and he looked as though he was dead.

Q. Did you stop at the place where Couch was lying when you came back from the chase after these men?

A. Yes.

Q. Was Couch conscious or unconscious at that time?

A. Well, I—I didn't hear him say anything.

Q. Where was he lying?

A. Well, he was there to the right side of Freedmore, going down towards Brighton Road.

Q. Was that between McCullough and Brighton Road?

A. Yes.

Cross-examination.

Mr. Ammon:

[fol. 67] Q. All of you boys were arrested after this shooting weren't you?

A. On that same morning.

Q. Yes.

A. Yes, we were taken down to the hospital first and then from there we was locked up.

Q. Taken up to the lock-up, all of you?

A. Yes.

Q. Including Brady?

A. Yes.

Q. You were all pretty well under the influence of liquor, too, weren't you?

A. Well, we had been drinking, yes, sir.

Q. Now, what is your present occupation?

A. Fort Pitt Bedding Company.

Q. You did work for the Pennsylvania shops down there at Marquis street, didn't you?

A. No, sir, never did.

Q. Where did you work before you worked for the bedding company?

A. Well, I worked for McCarthy's awhile on Diamond Street, lunch counter.

Q. Were you a member of that Ruett Club over there?

A. No, sir.

Q. Well, now, on this afternoon, what time was it when you first met this gang?

A. Well, I was eating dinner and Brady came in and we got to talking, and when we came out we called Tommy, he was there on the corner, and we started around to Pete's place.

Q. Where was this corner that you started from?

A. Well, it is the corner of Irwin and Pennsylvania avenue at that restaurant.

Q. Then you went to Pete's place, and what did you get?

A. Well, we got two half pints of that white mule, and four bottles of beer.

Q. What did you do with that?

A. We took that with us to where Hopkins was rooming.

Q. How long did you stay there?

[fol. 68] A. Well, I guess we got to Tommy's place around four o'clock or something like that. Then we came down at six, Tommy went to get his supper and feed his horses, and after that we went up to his room again around eight o'clock, I think, the second time.

Q. Did you get some more white mule?

A. Yes. When we came down, B. Burns and George Dailey and I went around to Pete's again and B. Burns went in and got another pint of that stuff we waited outside.

Q. Where did you drink that?

A. Well, we went around to Tommy's stable at the Allegheny Basket Company and drank part of it there.

Q. When did you get the next white mule?

A. We got that after we came out the last time from Tommy's room. That was around eleven o'clock, when we came down out of ther- the second time?

Q. At eleven o'clock?

A. Yes, sir.

Q. Drinking all the time?

A. Well, yes, you might say that we had something all the time.

Q. Drinking white mule and drinking beer?

A. Yes.

Q. Now, you got to the corner of Irwin avenue then and Freedmore street about one o'clock?

A. Around one o'clock.

Q. And that's where the wrestling match took place between Tommy Hopkins and Brady?

A. Yes, sir.

Q. How long did that last?

A. I guess they was wrestling around there three or four minutes.

Q. Were they on the pavement, both of them?

A. Yes, sir.

Q. What were you doing?

A. I was just standing there looking on.

Q. Then it was about that time that Valotta came along with the other man, wasn't it?

A. Yes, sir.

Q. And they came out of Irwin avenue and made a sort of detour between you and the Presbyterian church, didn't they, on Freedmore street?

[fol. 69] A. They passed behind me. I had my back to them.

Q. They were out on the asphalt surface when they passed you?

A. No, they were on the sidewalk.

Q. On the sidewalk?

A. Yes, sir.

Q. And they hadn't said anything to you?

A. Didn't hear them say anything.

Q. Who said anything first?

A. Well, Hopkins was mumbling something when they passed.

Q. Did you hear what it was?

A. I couldn't make out what it was. He kind of stammers in his speech and he didn't talk very good.

Q. Hopkins then made a detour out in the street, didn't he.

A. Yes, sir.

Q. And this man and his friend got their backs to the wall?

A. They were standing down next to that building, yes sir.

Q. With their backs to the wall?

A. Yes, I think they had their backs to the wall.

Q. And Hopkins was approaching them and facing them with his fists going this way (indicating), wasn't he?

A. I couldn't say that he was *going* that. He was swinging his hands, but I didn't see that he had his fists doubled up. He was kind of stammering, you know.

Q. This man says, "Is it trouble you are looking for?

A. He said, "What you look for, trouble?"

Q. What did Hopkins say?

A. Well, he didn't get a chance to say anything before he was shot.

Q. This man when he pulled out the gun had his back to the wall?

A. Well, he was standing near the wall. I couldn't say whether he had his back exactly to the wall or not, but he was standing close to the wall.

Q. Hopkins was facing the wall?

[fol. 70] A. Hopkins was coming towards him.

Q. Facing the wall?

A. Yes.

Q. Coming towards the wall?

A. Yes.

Q. And this man was facing Hopkins?

A. Yes.

Q. Then he must have had his back to the wall?

A. Well, he must have.

Q. Then he fired this shot?

A. Yes, sir.

Q. And that's the only shot he fired at Hopkins?

A. That's the only one.

Q. Which direction did Hopkins's body fall after he was shot?

A. Well, his head fell towards the curb. That's the way he was laying.

Q. Did he fall on his face or on his back?

A. He was laying on his back when I saw him.

Q. How many seconds was it after that that Couch came along around there?

A. I have an idea it was about thirty seconds.

Q. About thirty seconds or a half a minute?

A. Something like that.

Q. Did he come from Irwin avenue?

A. I thought he turned the corner from Irwin.

Q. When he passed you at the corner of Irwin, you did not know it was an officer, did you, at first?

A. Well, I wasn't paying him any attention at first, no, sir.

Q. How close was Couch to you?

A. Well, I don't know. He probably was six or eight *eight* feet from me when he turned around that corner there.

Q. That afternoon about four o'clock you men were down Marquis street there, weren't you, around the shops of the Pennsylvania Railroad taking a walk?

A. Well, we went up that alleyway when we were going up to Pete's.

[fol. 71] Q. That is Marquis street?

A. Well, that alley, I don't know what they call it.

Q. You were around the shops then after that?

A. We went up through that alleyway.

Q. You knew this man had worked there, didn't you?

A. No, I never saw him before as I know.

Q. You didn't know him?

A. No.

Q. How long before Couch came running around the corner at the time or shortly after Hopkins was shot was it that you had seen Couch, the officer?

A. Well, we saw him maybe forty-five minutes ahead of that, down on the corner of Irwin and Pennsylvania avenue there at the restaurant.

Q. Down at the corner of Irwin?

A. Yes, sir.

Q. At that time did he tell Hopkins to go home?

A. Yes, sir.

Q. What did Hopkins say at that time?

A. Well, he made some remark, said—he wouldn't go anyway; he went back in the restaurant a little while.

Q. How long were you at the corner of Freedmore and Irwin avenue before the shooting?

A. About a quarter of an hour, I guess.

Q. Was there loud talk there?

A. Oh, we were talking, they was wrestling and they were laughing, and I expect we was making a little noise.

Q. You were singing, some of you?

A. We might have been singing coming up Freedmore street.

Q. One o'clock Monday morning?

A. Yes, sir.

Q. At the time that Officer Couch told Tom to go home, you had been making some noise down there, hadn't you?

A. Well, Tommy was talking a little loud.

Q. How far away was that from this particular corner of Irwin and Freedmore?

A. Where he told him to go home, that was down on the corner of Irwin and Pennsylvania. I don't know whether it is two or three blocks or something like that from where the shooting happened.

[fol. 72] Q. How many men were in that gang at the time that Valotta and his friend passed you there?

A. Well, there was four of us.

Q. Well, wasn't there two more fellows came there, Conoran or whatever his name was and some other fellow?

A. Well, they came there, yes.

Q. Well, that made five, didn't it?

A. No, sir. There was three of us there, Hopkins, Brady and myself, and these other two men came, Conoran and his friend. Conoran stopped and the other man went on. That left four.

Q. It was foggy that night?

A. Yes, sir.

Q. Very foggy?

A. Well, it was quite foggy, yes.

Q. A good deal of smoke around there too, wasn't there, from the engines?

A. Seemed to be some smoke, yes, sir.

Q. Smoke and fog?

A. Yes.

Q. A whole lot of it? You spoke in your testimony about "They were shooting at the officer." How many men did you see shoot at this officer?

A. Well, if I said "they," I didn't mean they. I meant the one fellow. I didn't see but the one shoot.

Q. Well, which one was that?

A. Well, it was the smallest fellow of the two. I couldn't recogniz—I didn't get to see the gentleman's face enough to know.

Q. You couldn't identify the man shooting at all?

A. No, sir.

Q. How far away from you was he?

A. When they first shot?

Q. Yes.

A. I have an idea it was ten or fifteen feet away from me, something like that.

Q. When they first shot the officer?

A. Well, it was a little farther than that. When they shot Hopkins, they went on down the street a little farther before they shot the officer.

Q. How far could you really see on that night to distinguish any individual?

[fol. 73] A. Well, I don't know, if you knew anyone real well, you might tell—that is, from the corner of Irwin down to McCullough, where that light is, if you know them and see them under that light you might recognize them, but between that distance, I don't think you could because it was dark.

Q. If you didn't know them you couldn't identify them ten feet?

A. Well, if you didn't know them you couldn't.

TESTIMONY OF CLYDE S. EDEBURN

CLYDE S. EDEBURN, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. What is your name?

A. Clyde S. Edeburn.

Q. Where do you live?

A. 816 Columbus avenue, North Side.

Q. I believe you are one of the city detectives of the City of Pittsburgh?

A. Yes, sir.

Q. How long have you been connected with that department?

A. Seventeen years.

Q. Were you with Mr. Gardner, the district attorney, and myself and Mr. Morgan and Mr. Brady last Friday morning on the location of this shooting?

A. Yes, sir.

Q. Did you make certain measurements at that place?

—. ——.

Q. Do you know Mr. Brady?

A. Yes, sir.

Q. Who was it that pointed out the various points that were measured by you as connected with the shooting on the night of October 30th or the morning of October 30th?

A. Mr. Brady.

Q. Now, I will ask you, Mr. Edeburn, what is the distance from the curb line on Irwin avenue to the east curb line of McCullough street going up Freedmore street?

A. One hundred and seventy-seven feet.

[fol. 74] Q. And what is the distance from the curb line on Irwin avenue to the point where Hopkins was shot and fell on Freedmore street?

A. Twenty-four feet.

Q. What is the width of the sidewalk on Freedmore street between the curb line and the house opposite where Hopkins was shot?

A. Five feet ten inches.

Q. What is the width of Freedmore street between curbs?

A. Eighteen feet.

Q. What was the distance from the curb on Irwin avenue to the point where Couch was shot by Valotta?

A. One hundred and two feet.

Q. What was the distance from the point where Couch was shot to the point where he finally fell after staggering or walking some distance?

A. One hundred and fifty-eight feet.

Q. What was the distance from Irwin avenue curb line to the point where the man was standing who shot Couch?

Mr. Ammon: Do I understand that this is all predicated on Mr. Brady's testimony?

Mr. Estep: On Mr. Brady's testimony.

(Question read.)

A. That would be about one hundred and fifteen feet.

Mr. Estep:

Q. About fifteen feet away or beyond where Couch was shot?

A. Yes.

Q. What is the width of Irwin avenue?

A. Twenty-one feet.

Q. What is the distance, Mr. Edeburn, of the offset between Armandale street where it comes into Irwin avenue and the curb line of Freedmore street where it runs off of Irwin?

A. Twenty-seven feet.

Q. Where is the electric light on Irwin avenue with reference to Armandale street and Freedmore street?

A. On the south side of Armandale street and Irwin.

[fol. 75] Q. Is there an electric light on Freedmore at the corner of McCullough and Freedmore?

A. Yes, sir.

Q. What building is on the right hand side of Freedmore street as you go towards McCullough street and Brighton Road?

A. Fifth U. P. Church.

Q. That is called the Witherspoon Church?

A. Yes, sir.

Q. I will ask you whether or not that church occupies the entire square?

A. The church and the yard occupies the entire square between Irwin avenue and McCullough street on Freedmore street.

Q. What is the width of the curb or the sidewalk on Irwin avenue in front of the house that stands on the corner of Freedmore and Irwin?

A. Eight feet.

Q. Is that the entire sidewalk?

A. Up to the steps.

Q. Then the steps, do they run down on to the sidewalk?

A. Yes, sir.

Cross-examination.

Mr. Ammon:

Q. Mr. Edeburn, you are not a civil engineer?

A. No, sir.

Q. And the measurements that you took were all predicated on the directions and statements of Mr. Brady?

A. Yes, sir.

Q. The witness that was on the stand here?

A. Yes, sir.

Q. According to the testimony of Brady and your measurements, how close was Valotta to Couch during the time he was firing these shots?

A. About ten or fifteen feet.

Q. Where was Couch?

A. Couch was on the right hand side of Freedmore street.

Q. Going towards Brighton Road?

A. Going towards Brighton Road.

Q. And Valotta was on what part of the street?

A. On the sidewalk.

[fol. 76] Q. On the same sidewalk?

A. On the left hand sidewalk going towards Brighton Road.

Q. How far according to that was it that Officer Couch went after he had been shot before he finally fell?

A. One hundred and fifth eight feet.

Q. How far did the officer run after he was shot until he fell?

A. Eighty-three feet. No, a hundred and fifty-eight. Pardon me.

Q. What is this hundred and two feet you talked about?

A. From the corner of Irwin avenue to the place he was first shot, first shot was fired at the officer.

Q. He fell one hundred and fifty-eight feet beyond that one hundred and two feet?

A. Yes, sir.

Q. Then you would add one hundred and two feet to one hundred and fifty-eight feet; then at the time Couch finally fell and was picked up, he was two hundred and sixty feet from the corner of Irwin avenue, was he?

A. Yes, sir.

Q. Do you know what the distance is between Irwin avenue and Brighton Road?

A. We didn't measure it, but the squares look alike. It was one hundred and seventy-seven feet to the curb line of McCullough street, east curb. Those squares look alike. We didn't measure.

Mr. Estep:

Q. After the defendant in this case, Joe Valotta, was arrested, do you know whether or not he was taken to the scene of this shooting?

A. Yes, sir.

Q. Were you present at the time he was taken to the scene of the shooting?

A. Yes, sir.

Q. And did he at that time make any statement or point out any particular points?

A. He did.

Q. And did those points that you measured on Friday that were pointed out to you by Mr. Brady correspond with the points that had been given to you by Valotta at the time he was over there?

A. Yes, partly. There was some difference in them.

[fol. 77] Q. Which particular points if any that you have in mind was there a difference?

A. Well, in the position that Valotta was when he first shot, when the first shot was fired.

Q. What was the difference in feet?

A. He had about ten feet added to what Brady had of the distance that Hopkins was towards him, and he was about ten feet farther down.

Q. Was there any difference in the relative distance between him and Hopkins?

A. Yes.

Q. How far did he say he was away from Hopkins?

A. He pointed out it would be about twenty feet.

Q. Do you know the coal hole that is in the side of that house on Freedmore?

A. Yes, sir.

Q. Did he make his statement in reference to that coal hole?

A. Yes. He said that Hopkins was up to that coal hole.

Q. And he was about——

A. He was about twenty feet farther.

Q. So he would be, then, at the time he shot Hopkins, according to his statement, twenty feet at least from Hopkins?

A. Yes, sir.

TESTIMONY OF WILBER CONORAN

WILBER CONORAN, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. Your name is Wilber Conoran?
A. Yes, sir.
Q. Where do you live, Mr. Conoran?
A. 2587 Charles street, North Side.
Q. How long have you lived on the North Side?
A. About ten or eleven years.
Q. How old are you?
A. I will be twenty-three the 14th of October.
[fol. 78] Q. What do you work at?
A. Why, chauffeur for the Pittsburgh Ice Company; in other words truck driver.
Q. How long have you been working for the Pittsburgh Ice Company?
A. Six or seven months.
Q. Prior to that time where did you work?
A. Why, I worked for the National Casket Company.
Q. How long did you work for them?
A. I guess I worked there for almost a year.
Q. And before that?
A. Pressed Steel Car Company.
Q. Now Mr. Conoran, on the early morning of October 30th of last year, around one o'clock, where were you?
A. I was down at the Purity Restaurant.
Q. Where is it located?
A. Corner of Pennsylvania and Irwin avenue.
Q. What time did you leave the Purity Restaurant?
A. I judge it would be ten minuted after one.
Q. Did you leave in company with any one?
A. Why, there was two of us—three of us together.
Q. Which way did you go when you left the Purity Restaurant?
A. Up Irwin avenue towards Jackson street.
Q. Was that on your way home?
A. Yes, sir.

Q. When you came to the corner of Freedmore and Irwin avenue, did you meet anybody you knew?

A. Freedmore and Irwin?

Q. Yes.

A. Why, before I got that far I met this here one fellow, and the two of us went up to the corner of Irwin avenue and this here side street.

Q. Freedmore?

A. Freedmore street.

Q. Who did you meet there if anybody?

A. Mr. Brady and Mr. Rodgers and Mr. Hopkins.

[fol. 79] Q. Did you know the three of them at the time?

A. Why I knew Brady and Hopkins, the name. I didn't know Rodgers only to see him.

Q. Then when you arrived at that corner, did you stop or go on?

A. Why, Hopkins asked for a cigarette and I stopped to give him a cigarette.

Q. Who was the man that was with you?

A. Why, Edward Jeckels.

Q. Where did he go?

A. He went straight on up the street.

Q. Then you stopped at the corner with these three men?

A. Yes, sir.

Q. How long were you there before the shooting took place?

A. I guess I was only there about six or seven minutes or so.

Adjourned to Tuesday, March 13, 1923.

Tuesday's Session—March 13, 1923

WILBER CONORAN recalled

WILBER CONORAN recalled for further direct examination.

Examination by Mr. Estep:

Q. You were on the stand when Court adjourned yesterday, and I believe the last thing I asked you was to tell the Court and jury what happened after you arrived at the

corner of Freedmore and Irwin avenue, about 1:00 o'clock that night of October 30th.

A. After I went there I started talking to Hopkins, and Rodgers and Brady and I was talking there for a while, and they started wrestling. So these two fellows came along, Valotta and his friend, and they kind of stopped and watched them wrestling, and Couch he tried to get Hopkins to go home—he met him alongside the building there. So we was talking there, and I had my back towards Valotta and his friend. I had blood poison in my hand at the time, and I was talking about my hand. So the first thing I knew I heard someone say "Are you looking for something," or something of that order—I don't know just what it was. Then I heard a shot. So I turned around and Hopkins was shot. Just that quick Officer Couch appeared on the scene, and it seems he followed these fellows up the street. So [fol. 80] he gave c-ase after the fellows, and I stood there and watched the body of Hopkins—the machine ran in and ran over the body at Washington avenue and Freedmore street. So Couch and Rodgers and Brady they went down towards Valotta and his friend, to give them chase. I stood watching the body until Couch got shot. So after he got shot, from where I was standing you couldn't see very good on account of the fog, but I seen him go to his knees; that must have been the first shot. I turned around again, and he was up against the fence.

Q. Who got up against the fence?

A. Couch. So in the meantime these fellows were being chased, and I was hollering to get the wagon—"Get the wagon." I went down after officer Brown, and he was on his way up. Him and I comes up, and there was two fellows standing there that I thought was Valotta and his friend. He searched them, but it wasn't them at all. He asked where Couch's body was. I told the lady across the street to call up, and she called up for the wagon. I stayed there until everything was over, and I started up for the house.

Q. I believe on that night you had your arm in a sling, as a result of this blood poison, is that right?

A. Yes, sir.

Q. Had you been drinking?

A. No, sir.

Q. And you had been there about five or six minutes, or seven, before the shooting.

A. Seven or eight minutes before the shooting.

Q. Did you notice where Valotta and this friend of his came from?

A. They came upon the right hand side of Irwin avenue.

Q. On the right hand side of Irwin avenue?

A. Yes, sir.

Q. Going away from the City?

A. No, coming from the City, coming from Freedmore street.

Q. They would be on the left hand side of Irwin avenue, coming from the City, wouldn't they?

A. Yes, sir.

Q. That would be the same side of the street upon which you fellows were standing?

A. Yes, sir, going to the city.

Q. Were they coming from the direction of the City, or the other direction?

A. Coming from the City.

Q. And they would come on to the corner on which you fellows were standing?

A. Yes, sir, they had to cross over.

Q. They were on the other side of the street?

[fol. 81] A. Yes, sir.

Q. Did they cross from the opposite side of Irwin avenue to your corner?

A. Over to where we were standing.

Q. Did they walk on the sidewalk when they arrived at that corner, or on the street?

A. They were still on the street.

Q. When they arrived at the sidewalk, when they passed you fellows, going up Freedmore, were they on the sidewalk or street?

A. They were on the sidewalk.

Q. Now then that sidewalk is only about five feet ten inches wide there?

A. Just about enough for two to walk on.

Q. Did they pass right through the middle of you fellows?

A. No, they was behind us.

Q. You were out towards the curb more?

A. They was on the sidewalk, by the curb stone.

Q. Then they passed between you and the house?

A. No, they went around us.

Q. I show you Exhibit 5; show me where you were standing.

A. Right here, we was all standing there (ind.)

Q. Where you were standing; mark that with the letter "X."

(Witness does so.)

Q. Was that out near the curb on the street, or closer to the house?

A. Closer to the house.

Q. Then they went between the curb and you?

A. Yes, sir.

Q. Is that right?

Mr. Ammon: Objected to as leading.

Q. Standing next to the house — where did these men pass you?

A. They passed on the left hand side of us—they went clean around us.

Q. Were they on the sidewalk at the time they passed you?

A. No, they was in the street.

Q. What street?

A. They was on Irwin, and they crossed around the corner on to Freedmore street.

[fol. 82] Q. They were on the street—on Irwin or Freedmore?

A. They was right on both them—they had to go on both.

Q. When they passed you, going up Freedmore street were they walking on the sidewalk or on the street?

A. They was on the street.

Q. Out in the street.

A. Out on the street, and then right on the sidewalk.

Q. How did they get on to the sidewalk?

A. From the top of the curbstone.

Q. What curbstone?

A. On the corner of Freedmore and Irwin.

Q. Well, they had to be on Irwin, if they were crossing Irwin?

A. Yes, sir.

Q. Did they get on the sidewalk just after they crossed Irwin, or how?

A. After they passed us they went on the curbstone.

Q. How far up above Freedmore street did they go before they got on the sidewalk?

A. When they passed us—that is all-right onto the curb.

Q. You have the picture in front of you, I can't show you any plainer; show me, by a line and an arrow, where they came from, from what direction.

(Witness does so.)

Q. Now trace that line to show where they came on the sidewalk, on Freedmore and Irwin.

(Witness does so.)

Q. And how far were they away from the sidewalk at the time they were on Freedmore street?

A. How far from the sidewalk?

Q. From the curb.

A. Just about a foot and a half.

Q. Then when they were crossing Irwin avenue they had never gotten on to the sidewalk at all, they just continued up Freedmore street after they crossed Irwin?

A. Irwin avenue, yes, sir.

Q. How many feet from the corner of Freedmore and Irwin was it that they turned on to the sidewalk?

A. I judge about three feet.

[fol. 83] Q. About three feet from the corner of Irwin and Freedmore they got on the sidewalk—at the corner of Freedmore and Irwin?

A. Freedmore and Irwin.

Q. They they got on the sidewalk right at the corner, didn't they?

A. Not at the corner, no sir.

Q. Well, three feet from the corner?

A. About three feet from the corner of Irwin avenue.

Q. And there is that much of a curve there where the curb is cut out?

A. I mean three feet from where we were standing.

Q. Why don't you say what you mean? I asked you where they got on from the corner of Freedmore and Irwin; I asked you where they came on the sidewalk, with reference to the corner of Irwin and Freedmore?

A. I don't know how many feet.

Q. Where were you standing, how many feet from the corner of Irwin and Freedmore?

A. I wasn't a foot away from the curb.

Q. Where did they come on, how many feet from where you were standing?

A. I guess about six feet or so.

Q. How far was Couch away from you at the time you saw or heard the shot?

A. I judge about 100 feet.

Q. Could you see Couch at the time that shot was fired?

A. I could just see him go down—I saw his shadow going down.

Q. Could you see him on his knees?

A. Yes, sir.

Q. Then why do you call it a shadow?

A. You couldn't see in front of you?

Q. Well, could you see him?

A. Yes, sir.

Q. A hundred feet away?

A. A hundred feet away.

Q. How do you know he went down on his knees?

A. I seen him go down on his knees.

Q. How many shots did you hear?

A. I judge about three shots.

[fol. 84] Q. Then what did Couch do after you heard those shots?

A. Why, he went over towards the fence, and feel down there and started moaning for the wagon.

Q. What fence?

A. The house that sets on the corner of Brighton Road and Freedmore street, in the back there.

Q. Did you see him going from the spot where he fell on his knees, to the place where he fell near the fence?

A. Yes, sir.

Q. How far would you say that was?

A. I guess five or six feet.

Cross-examination.

Mr. Ammon:

Q. Was it pretty foggy there?

A. Yes, sir.

Q. You said you couldn't see your hand in front of your face?

A. I said you could hardly see in front of you.

Q. It was foggy?

A. Yes, sir.

Q. Was there much smoke coming from the Round House in the yards at that time, or do you know?

A. I never took notice to that.

Q. Now, at the time you got there, had Rodgers and Brady been wrestling?

A. They started wrestling after I was there with them.

Q. What started them at that wrestling bout?

A. They were just cutting up, fooling.

Q. And were they both down on the pavement, in the cutting up process?

A. Yes, sir.

Q. When was it Couch came there—about that time he told Hopkins to go home he was drunk—before or after that wrestling?

A. That was before.

Q. What did Couch say to Hopkins?

A. He said it is pretty near bed time.

Q. What did the officer say to those men wrestling there?

A. They wasn't wrestling when the cop went past.

Q. That was Couch, was it?

[fol. 85] A. Yes, sir.

Q. They had been singing, hadn't they?

A. Hopkins was singing a little bit.

Q. And there was loud talking going on?

A. It wasn't so very loud.

Q. That is the coner where the church is on one corner, the Presbyterian Church?

A. Yes, sir.

Q. And Mrs. McFadden's brick house on the other corner, where you were standing?

A. Yes, sir.

Q. The dress-making establishment?

A. Yes, sir.

Q. And right across the street were all these Irwin avenue residences and dwelling houses, a solid row of brick?

A. Yes, sir.

Q. How long was Couch there the first time, when he told Hopkins to go home?

A. He just went past, and said it as he went past.

Q. How long was it until he came back again, when the shot was fired?

A. About three or four minutes I guess.

Q. Where did he come from, the first time you saw him at the corner of Freedmore and Irwin?

A. He come down Irwin avenue.

Q. Past the Presbyterian Church?

A. Yes, sir.

Q. And Brady was drunk?

A. He wasn't so drunk?

Q. Rodgers was pretty full too?

A. Rodgers was pretty well sobered.

Q. How far had the officer got down Irwin Avenue, if you know, before you heard the shot fired, and then ran up back to Irwin and Freedmore?

A. I can't say how far he was down.

Q. It couldn't be very far?

A. No, sir.

Q. Because he heard the shot?

A. He heard the shot.

[fol. 86] Q. And came on back?

A. Come back up Irwin Avenue.

Q. You hadn't seen these boys any time before that evening, had you?

A. No, sir.

Q. That is the first time you saw them?

A. Yes, sir.

Q. That is when you came from the restaurant?

A. Yes, sir.

Q. Now, there is an electric light near the mouth of Armandale Street and Irwin, isn't there?

A. There is one on the corner of Armandale, at the grocery store there.

Q. So that when that is burning at night it throws a shadow over the angle of Mrs. McFadden's brick house, doesn't it?

A. Yes, sir, the front of the house.

Q. So when these two men came out of Armandale Street up Irwin, did they sort of hesitate before they went to pass your crowd?

A. No, they never hesitated at all.

Q. They came right ahead, did they?

A. When they were crossing the street they came straight across.

Q. They came straight across Irwin?

A. Yes, sir.

Q. And went into Freedmore Street on the street surface, and not on the sidewalk?

A. Yes, sir.

Q. At that time your back was towards Mrs. McFadden's front door, wasn't it?

A. Yes, sir.

Q. So they detoured around, and didn't use the sidewalk, at all, did they?

A. No, sir.

Q. When was it that Hopkins broke away from your gang and approached these men?

A. I didn't take notice of Hopkins going away at all.

Q. You didn't?

A. No, sir.

Q. You heard the shot, and that was the first notice you had of that?

A. Yes, sir.

[fol. 87] Q. You saw Hopkins facing the side of Mrs. McFadden's house where the coal hole was?

A. I never took notice of the coal hole.

Q. He was facing the side of that house when he was shot, is that right?

A. I had my back turned when he was shot.

Q. And Valotta and his friend had his back to the wall?

A. Valotta had his back to the wall, and his friend was trying to keep him from shooting.

Q. And that quick Couch returned to the corner?

A. Yes, sir.

Q. Come up around the corner?

A. Come up Irwin and turned into Freedmore.

Q. When he disappeared down Freedmore, you wouldn't have known it was an officer, it was so foggy, unless you knew it was Couch, because you had seen him a while before?

A. Yes, sir.

Q. And when you saw him go down to his knees his body appeared like a shadow?

A. Yes, sir.

Q. Do you know how far away from Couch was Valotta, at the time the first shot was fired?

A. I couldn't see him at all.

Q. On account of the fog?

A. Yes, sir.

Q. Then you began to run down, did you, towards McCullough street and Brighton Road?

A. No, I stood watching the machine turn in, and it run over Hopkins' body.

Q. You watched the body?

A. Yes, sir.

Q. As I get the gist of your testimony, Mr. Concoran, the only time you saw these men on the sidewalk, at the corner [fol. 88] of Irwin and Freedmore, or on the sidewalk of Freedmore Street, was at the time this man (indicating the defendant) had his back to the wall, and was shooting at Hopkins in front of him?

A. After they passed us they got on the sidewalk, and he wanted to stop, and his friend got him to go on.

Q. You heard this man, or somebody, say "are you looking for trouble"?

A. Something to that effect.

Q. Did that make you look around?

A. I looked around, yes, sir.

Q. Didn't you see Hopkins standing up facing this man who had his back to the wall, with his fists in a fighting position, doing this way (ind.)?

A. No, I did not.

Q. Was it too foggy?

The Court: He said he didn't.

Mr. Ammon:

Q. Was it too foggy?

A. No, it wasn't too foggy.

Q. What was the position of Hopkins' arms?

A. He had his hands down when I seen him.

Q. How long was it before he was shot?

A. He was shot right away.

Q. You didn't get over to where the body of Couch was lying when he finally sagged down to the pavement, did you?

A. No, sir.

[fol. 89] TESTIMONY OF RICHARD PORTER

RICHARD PORTER sworn.

Examination by Mr. Estep:

Q. Your name is Richard Porter?
A. Yes, sir.
Q. And where do you live?
A. 1600 Brighton Road, North Side, Pittsburgh.
Q. I show you Exhibit No. 8, and ask you whether or not you recognize that photograph?
A. Yes, sir.
Q. Does that show the house in which you live?
A. Yes, sir.
Q. On the early morning of October 30th, 1922, about 1:00 o'clock, or shortly after, were you at home?
A. I was.
Q. Were you awake or in bed?
A. I was in bed, awake.
Q. And was there anything that attracted your attention about 1 or 1:15 that morning?
A. Well, I heard some loud talking, and some noise, and I heard a single shot, and I immediately got out of bed and looked out of the window.
Q. Does Exhibit 8 show the window you looked out of?
A. It does.
Q. Just mark that with the letter "W."

(Witness does so.)

Q. I believe McCullough Street runs in the rear of your house, is that right?
A. That is right.
Q. And about what is the depth of your lot running from Brighton Road to McCullough, along Freedmore Street?
A. Something like 100 or 125 feet.
Q. And how far would you be, looking out of that window, from the corner of McCullough and Freedmore Streets?
[fol. 90] A. It is a diagonal distance—that would make it about 125 feet.
Q. Do you know whether there is an electric light on the corner of Freedmore and McCullough?
A. Yes, sir.

Q. Was it lit on the night in question?

A. Yes, sir, it was lit.

Q. After you heard the shot and went to the window, just tell us what you saw?

A. I saw four flashes; they seemed to be about in the direction of the International Garage. I saw Couch drop to his knee, just about under the light, and then Valotta and his friend ran down Freedmore Street, pursued by Mr. Brady and Mr. Rodgers, and the one heavier built fellow turned up Brighton Road, just around the corner.

Q. Looking out of the window, where you were looking, did you see officer Couch go down on his knee?

A. Yes, sir.

Q. And did you see the four flashes of the gun at the time he went down on his knee?

A. I saw the four flashes, yes, sir.

Q. How far away were you from officer Couch when he went down on his knee?

A. He was about the corner of McCullough and Freedmore—about 130 feet.

Q. And could you see the officer at the time?

A. I could see the officer.

Q. And did you know, and could you tell whether or not he was an officer at the time?

A. I could see the flash of his brass bottons, yes, sir.

Q. I show you Exhibit 7, and ask you whether or not you recognize that photograph?

A. I do.

Q. Does that show the location, or at least the point from where these four flashes came that night?

A. It shows the point where the four flashes came that night, yes, sir.

Q. Mark that with the letter "X."

(Witness does so.)

[fol. 91] The Witness: I don't say for sure, but I think they came from there, on a sort of diagonal, out of the middle of the street.

Q. They seemed to be in the middle of the street?

A. Yes, sir.

Q. When you saw the flashes?

A. Yes, sir.

Q. Will you step down and show the jury the window that you were looking out of, and show them where McCullough Street is on that picture?

(Witness does so.)

Q. After you saw the four flashes, and saw Couch go down on his knee, did you notice what Couch did after that?

A. He got up right away, and he said, "get them, he shot me in the neck."

Q. Did you hear him saying that?

A. I heard him say that, absolutely.

Q. What did he do then?

A. He come down Freedmore Street, and went over towards the sidewalk, and just about almost at the end of our wooden fence he fell over on the sidewalk.

Q. And at the time you heard him say "they shot me in the neck, get them," where were the men that did the shooting?

A. I saw the heavier fellow, he seemed to be out a little bit from the sidewalk on the other side. He was just getting on the curb at the corner of Freedmore, the nearest curb to Brighton Road, and the other fellow was ahead of him a little bit.

Q. From this light on McCullough Street, could you see the figures of these men plainly at that time?

A. I could see them pretty plain, but they were over against the other house, and I didn't examine them so much.

Q. What was the condition on that side of the street next to the house, was it dark or light?

A. It wasn't dark—no, but the house is a dark frame building.

Q. I show you Exhibit 8, and ask you *fi* that shows the point where Couch fell?

A. That shows the point where Couch fell—it does.

Q. I call your attention to the letter "F" that is already on that photograph, and ask you if that is the approximate spot where Couch fell?

A. Yes, sir, it is.

[fol. 92] Cross-examination.

Mr. Ammon:

Q. How long have you folks lived at this corner?

A. About six years.

Q. The night was foggy, or the morning was somewhat foggy?

A. The night was clear, except for a little fog that is always in Pittsburgh at night.

Q. It was foggy at that particular point at that time?

A. Just a little foggy, yes, sir.

Q. And there is a lot of smoke blowing from the round house all the time there?

A. I didn't notice any smoke.

Q. It is the usual thing, a lot of smoke?

A. Very seldom the smoke comes down. Those stacks at the shops are very high.

Q. Well, there are about 100 or 200 locomotives in the yard all the time, aren't there?

A. They are quiet at night.

Q. Their stacks are not above the level of your house, are they?

A. No, they are not, but they kill the fires of the locomotives very often.

Q. You testified at the Coroner's inquest, didn't you?

A. Yes, sir.

Q. Didn't you testify before the Coroner in the case, that you were not certain about this man having a uniform on until you went down and looked him over?

A. I don't think I did; if I did I didn't mean it.

Q. I will read you the question and answer:

"Q. Did you notice whether or not the policeman was in uniform?"

"A. Yes, sir, at the time it seemed that he did have a uniform on, and when I went down stairs I went over the back fence and I seen that he had his uniform on;"

did you testify to that?

A. Yes, sir.

Q. Now you were awakened up in your slumbers that night by loud voices?

A. No, I wasn't wakened by the loud voices, I had been awake.

Q. Did you hear some singing going on?

A. I heard a little singing, yes, sir.

Q. That was the gang down at the corner of Freedmore and Irwin?

[fol. 93] A. Yes, sir.

Q. Your house is 125 feet from the front of McCullough Street?

A. I believe so.

Q. And there is the width of McCullough Alley, 16 feet, and then the distance from McCullough Alley to the garage down at the corner is 177?

A. No, the garage is on the corner.

Q. Of McCullough Alley?

A. Yes, sir.

Q. So you heard this noise coming a distance of 177 feet, plus 16 feet, plus 125 feet, practically, is that right?

A. Yes, sir.

Q. How long did that noise keep up before you heard the shot fired?

A. About five or ten minutes.

Q. Did you hear any loud or angry voices before the shot was fired?

A. I didn't take notice, I don't think I did.

Q. When you heard this first shot fired, you went and looked out of the side window?

A. Yes, sir.

Q. And at that time where was Officer Couch?

A. At the time the four shots were fired——

Q. No, right after the first shot was fired, you looked out of the window?

A. I didn't get to the window until the other four shots were fired.

Q. Then you didn't see any of the fuss until after the four shots were fired?

A. Until the four shots were fired—I *was* the four flashes.

Q. You saw the four flashes?

A. Yes, sir.

Q. And were they around this arc lamp at the McCullough Alley?

A. They were alongside the arc lamp.

Q. On your side, or the opposite side?

A. By the garage.

Q. By the garage?

A. Yes, sir.

[fol. 94] You didn't take particular notice which one of these two men, or whether both — them had revolvers in their hands, did you?

A. No, I didn't, I just saw them running down on the other side.

Q. You saw the flashes, but didn't see who had the revolver in his hand?

A. No, they were too close together

Q. Where was Couch when you first saw him?

A. About under the arc light.

Q. Then he staggered along until you got some distance from there, alongside of your fence?

A. Yes, sir.

Q. Then he said "Get them, they got me in the neck?"

A. Yes, sir.

Q. You couldn't tell how these two men were dressed?

A. No, I didn't take much notice, I was watching Mr. Couch.

Q. One of them ran up the Brighton Road, and you say it was the stouter man of the two?

A. Yes, sir.

Q. You couldn't tell whether he had a cap or hat on?

A. I couldn't say that I just saw him.

Q. Did you see Brady and Rogers running up there?

A. Yes, sir.

Q. How were they dressed?

A. I couldn't tell you how they were dressed.

Q. You didn't take notice to the wearing apparel of anybody except the police officer?

A. That's it, I couldn't help take notice to it.

Redirect examination.

Mr. Estep:

Q. You go to High School over there?

A. Yes, sir.

Q. How long have you lived in this particular place?

A. At 1600 Brighton Road, I have lived six years.

Q. These stacks in the Pennsylvania Railroad *year,* are they high stacks?

A. They are very high, yes, sir.

Q. Does the smoke, when the wind blows in your direc-

tion, go down on the ground, or does the height of the stacks tend to cause it to go high in the air?

[fol. 95] A. The wind carries the smoke up. The only time we have smoke hanging low is when there is no wind, just before a rain.

Q. What time did you retire on this particular night?

A. I had retired, I expect, about 10 o'clock.

Q. Had you been out that evening?

A. No, sir.

Q. Before you retired, did you notice whether or not there was any smoke of any amount down around that neighborhood?

A. I didn't notice.

Q. When you looked out of the window that night, after the shot, did you notice whether there was any smoke to amount to anything?

A. I didn't see any smoke.

Q. Were you able, from the window that you looked out of, to notice the difference in the size between the individuals who were together?

A. I noticed Valotta and his friend were of different size, that is, when they went under the window.

Q. They passed on the other side from your window?

A. One opposite on the sidewalk, and the other on the street—he kept very close to the house.

TESTIMONY OF A. MUSHER

A. MUSHER sworn.

Examination by Mr. Estep:

Q. What is your name?

A. Ambrose Musher.

Q. Where do you live?

A. 1604 Irwin Avenue.

Q. Do you know where Freedmore Street runs into Irwin?

A. Yes, sir, right in the front of my street.

Q. Looking from the window of your house, as it extends on Irwin Avenue, can you see Freedmore Street?

A. Yes, sir.

Q. What part of Freedmore Street can you see?

A. I can see clean along Freedmore Street.

Q. Your house stands at the full opening of Freedmore Street?

A. Yes, sir.

Q. I show you Exhibit 7, and ask you whether or not you recognize that photograph?

A. Yes, sir.

[fol. 96] Q. Does that show your house?

A. Yes, sir, right here is my house (indicating).

Q. On the evening or early morning of October 30th, 1922, were you at home?

A. Yes, sir.

Q. What floor were you on?

A. Third floor.

Q. And were you awake or were you asleep at 1 o'clock, or shortly thereafter?

A. I just went to sleep.

Q. Were you awakened by anything?

A. Yes, sir, the first *host.*

Q. What did you do when you heard the first shot?

A. I got up and went to the window right away.

Q. Does that show the window you went to?

A. Yes, sir.

Q. Mark that with the letter "Y."

(Witness does so.)

Q. Just step down and show the jury the window you were looking out of this time.

(Witness does so.)

Q. You say, in looking out of that window you would have a clear view up Freedmore from Irwin?

A. Yes, sir.

Q. Can you see as far as the Brighton Road?

A. Yes, sir.

Q. When you came to the window that evening, after hearing that first shot, what did you see?

A. I seen two men taking an average of 15 to 20 steps, and the policeman appeared under the light.

Q. That is the light at McCullough Street?

A. Yes, sir.

Q. That is the street just above Irwin?

A. Yes, sir.

Q. Where were the two men you saw?

A. They were on the side where that house is, right close to the garage, way back between the houses.

Q. Close to what is known as the International Garage?

A. Yes, sir.

Q. Will you mark about where they were when you first saw them, with the letter "Z?" Mark it right over the man shown there, if that is the point.

[fol. 97] A. I would say right about there (indicating and marking).

Q. Now, after you first saw them, were they moving at that time?

A. Yes, sir, they just started to move away from the first man they had shot.

Q. In what direction were they moving?

A. They were going towards Brighton Road.

Q. That would also be towards McCullough Street?

A. Yes, sir.

Q. Did you see any more shots fired?

A. Yes, sir, the four shots fired at the policeman.

Q. Where were the two men when you saw the four shots fired?

A. On the side where the garage is, right close to the garage, right part way back of the house.

Q. Will you mark the place with the letter "R," where the two men were at the time you saw the four shots fired?

(Witness does so.)

Q. Could you see Couch at the time the four shots were fired?

A. Yes, sir.

Q. And how far away from him were you at the time?

A. Well, I couldn't exactly say; I was on the third floor looking down, and he was right close to those church steps there.

Q. If I told you that was 21 feet across Irwin Avenue, and two eight foot sidewalks, and then about 102 feet to those steps, approximately 140 feet, would that be about right?

A. That would be about the distance.

Q. Was the electric light lit that night?

A. Yes, sir.

Q. And could you see Mr. Couch plainly from the place you were looking?

A. Yes, sir, from the third floor looking down you could see him very plain.

Q. Did you know at that time, when you saw him whether or not he was an officer?

A. Yes, sir, you could tell he was an officer.

Q. How could you tell?

A. You could tell from the uniform of the man.

Q. When the four shots were fired what happened to Mr. Couch?

[fol. 98] A. Couch, when he was shot, he sort of turned, and then he went down, and he got up and started towards the Brighton Road, and as he got to the fence where the iron and wood begin, there is where he fell down and lay. When he was lying in the dark you could see him very plainly, you could see him after he got up from his knee.

Q. You say you could see him after he got up from his knee after the shots were fired; could you see him as he started and went towards the Brighton Road?

A. Yes, sir.

Q. And could you see him up until the time he fell?

A. Yes, sir.

Q. Now, after the shots were fired, did you notice the two men that fired the shots?

A. Yes, sir.

Q. And what did you notice about them?

A. They ran towards the Brighton Road, and the one kept a little close to the house, and that man made a bigger turn at the Brighton Road.

Q. Is there an electric light at the corner of Brighton Road and Freedmore?

A. Yes, sir, a sort of light that shines.

Q. Could you see them at the corner of Brighton Road and Freedmore?

A. Yes, sir.

Q. What time did you retire that night?

A. I guess somewhere around 10:00 o'clock or later. I had been lying in bed a long time, and I went to sleep.

Q. Had you been out late that evening?

A. No, sir.

Q. Did you notice the atmosphere in the neighborhood that night?

A. Yes, sir.

Q. Was there any smoke?

A. No smoke to amount to anything.

Q. When you looked out the window could you tell whether or not there was any smoke?

A. There was no smoke.

Cross-examination.

Mr. Ammon:

Q. I suppose you would say there is no fog either?

A. There was a small bit of fog, yes, sir.

Q. Now, you testified before the Coroner, didn't you?

A. Yes, sir.

[fol. 99] Q. You were awakened by some noise?

A. No, I was awakened by the shot.

Q. Didn't your wife come and complain to you that she had heard noises out on the street?

A. No, sir.

Q. She didn't?

A. No, sir.

Q. You were awakened by the shot?

A. Yes, sir.

Q. You had been asleep?

A. I just started to sleep, yes, sir.

Q. Was your wife in the same room with you?

A. Yes, sir.

Q. Had she complained to you about hearing any arguments down on the street?

A. No, sir.

Q. She hadn't?

A. No, sir.

Q. Did you make this statement before the Coroner: "When I got up I saw him stepping away from the first man that was shot?"

A. Yes, sir.

Q. And he was running down Freedmore Street?

A. Yes, sir.

Q. When I saw someone appear from the alley, and he shot him once, and the man went to his knees?"

A. Yes, sir.

Q. The officer came from the alley when they were runing away?

A. I didn't say he exactly came from the alley; I said he appeared in the light.

Q. The officer came from the alley when they were runing away, they were groing from Irwin Avenue and he was coming towards Irwin, and he shot him once, and then he shot him three times, and the policeman staggered over to the sidewalk and fell"; did you testify to that?

A. Yes, sir.

Q. Was this question asked you at the Coroner's inquest:

"Q. You didn't have a sufficient view of these men to identify them?"

And you answered:

"No I couldn't identify them."

A. Yes, sir.

Q. "Q. Did you hear any loud voices before you heard the first shot?"

And did you answer:

"They were arguing out there, my wife heard them and [fol. 100] told me to get up and see what it was."

A. No, I said there had been plenty of arguments on that corner, but I didn't testify I heard an argument.

Q. "Q. She wakened you?"

And did you answer:

"To get up to see what it was, yes, sir, just as I was getting out of bed the first man was getting shot;"

did you testify to that?

A. I testified whenever the first man was shot she says to get up, and I had already been wakened and I got up. As she said to get up, I got up.

Q. What had you been wakened by?

A. By the first shot.

Q. You were not wakened by your wife who heard the argument outside?

A. No, sir.

Q. Was this question asked you:

"Q. How far was it from the corner of Freedmore and McCullough Street to where the policeman was when the first shot was fired at him?"

And did you answer:

"I would say between 40 and 50 feet, he was coming towards Irwin Avenue, and they were running from Irwin Avenue."

"Q. He came out of McCullough Street?"

"A. Yes, sir.

"Q. And started towards Irwin Avenue?"

"A. Yes, sir; to where the shot was;"

is that right?

A. They asked where I thought he appeared from.

Q. Did you testify to that?

A. I didn't testify to all of that, no, sir.

Q. You didn't?

A. No, sir.

Q. This stenographer of the Coroner has you wrong?

A. He has some added that I didn't say.

Q. Did you first see the policeman coming out of McCullough Street?

A. He appeared under the light at McCullough Street.

Q. Was he running towards Irwin?

A. He turned towards Irwin.

Q. Was he running?

A. He was stepping towards the men.

Q. And the men were stepping towards Brighton Road?

A. Yes, sir.

Q. Don't you know that the officer came up Irwin, and was going down?

A. He may have.

Q. You are positive he was coming towards Irwin?

A. Yes, sir.

[fol. 101] Q. And they were running from Irwin?

A. They were going from Irwin, and he was faced towards Irwin, yes, sir.

Q. You are sure you didn't testify: "Q. He came out of McCullough Street?" And your answer was "Yes."

A. I said it appeared as if he came from there.

Q. Have you been talking to anybody since you were at the Coroner's inquest?

A. Oh, I talk every day.
Q. I mean about this case?
A. No, sir.
Q. Were you talking to anybody in the District Attorney's office about it?
A. No, sir.
Q. Or to any of the detectives about it?
A. No, sir.
Q. Not since the Coroner's inquest?
A. No, sir.

TESTIMONY OF JOSEPH PALERMO

JOSEPH PALERMO sworn and examined through the official Italian interpreter.

Examination by Mr. Estep:

Q. Your name is Joseph Palermo?
A. Yes, sir.
Q. Where do you live?
A. 915 Kirkbridge Street.
Q. On the North Side?
A. Yes, sir.
Q. How long have you lived on Kirkbridge Street?
A. Two years and a half.
Q. Where have you been employed in that two years and a half?
A. I work for the Screw & Bolt Company, and also at the Ft. Wayne Shop.
Q. Do you know Joseph Valotta, the defendant here?
A. Yes, *sir.*
Q. How long have you known him?
[fol. 102] A. About a year.
Q. On the evening of October 29th, 1922, were you with Joseph Valotta?
A. Yes sir.
Q. What time did you meet him on that evening?
A. It was after half past ten in the evening, and the defendant was at a party, at a God-mother's place of his.
Q. Where was this party, where was the house located?
A. Right across from defendant's house.
Q. Where does the defendant live?

A. On Lysle Street.

Q. Now, was the defendant Valotta at the party when you arrived there, or did you get there first?

A. I found Valotta there when I went there.

Q. Now, what time did you leave the party?

A. When I went there Valotta had some friends who were playing there, musical instruments, and I asked Valotta if those friends and him could come to a christening, then we went to this christening party.

Q. At what time?

A. It was about a little after 11:00 o'clock.

The Court:

Q. Whom do you mean by "we," who went to the party?

A. Joseph Valotta and lots of townsmen of mine.

Q. The musicians?

A. Yes, sir, five of them.

Mr. Estep:

Q. What time did you leave the christening?

A. It was about 1:00 o'clock in the morning.

Q. And with whom did you leave?

A. Joe Valotta, Joe Valotta's brother, and another townsman of Joe Valotta, I don't know his name, and another man by the name of Joe Restivo, and myself, that is all.

Q. And after you left the christening, then did you all stay together, or did you separate?

A. These other parties who were together with us—these other persons with us they were ahead, walking ahead of us, and Joe Valotta and myself were walking back of them.

Q. Then what?

A. Then Joe Valotta told me "Let's go out on the street," and when we come to this street we were talking together. And then I saw a police officer who was coming down. Then on the corner there was a bunch of drunken people. I said to Joe Valotta "Let's go this way." Then these [fol. 103] people who were drunk, started to say words to Joe Valotta.

Q. What did they say?

A. I don't understand English, I don't know.

Q. Then what?

A. While we were walking, and these people were still saying something to Joe Valotta, one of the crowd came towards Joe Valotta. Joe Valotta then turned towards the man who was following him, and this man then was towards Joe Valotta. I turned this way, and Joe Valotta he shot.

Q. How far away from Joe Valotta was the man that Valotta shot?

A. As far as from where I am sitting to that bench (indicating about from 10 to 12 feet).

Q. Then what did you do, and what did Valotta do after the shot was fired?

A. Joe Valotta started to run. I was all frightened, I remained astounded there. Joe Valotta, when he was near me he said "Walk." When I raised my head this way I turned my sight and I saw a person who was getting hold of Joe Valotta, was almost grabbing Joe Valotta. I turned one side and the other, because I was afraid myself to be grabbed, I was afraid of those people. I turned and I saw Joe Valotta still shooting.

Q. Now, at the time that Joe Valotta fired the first shot at Hopkins, did you say anything to him?

A. No, sir.

Q. After you saw Joe Valotta shooting the second time what happened then?

A. I was frightened and scared. When I heard the man who was shot say "My God" I went for the wall, walking around the wall, trying to get away from that place.

Q. You heard the man that was shot say "Oh my God?"

A. Yes, sir.

Q. And how far away was he from you when you heard him say that?

A. From where I am sitting to where this gentle— is (indicating about 15 to 18 feet).

Q. And how close was Joe Valotta to you at the time you heard this man say "Oh my God?"

A. I did'nt look at Joe Valotta, I didn't see him.

Q. When you strated to go up Freedmore Street towards the Brighton Road, how close was Joe Valotta as you ran towards Brighton Road?

A. When Joe Valotta was shooting then I saw him—while he was shooting I lost sight of him; I was watching myself and not Joe Valotta.

Q. You saw him when he was shooting?

[fol. 104] A. Yes, sir.

Q. How close was he to you then?

A. As far as from where I am sitting here to the middle row of chairs there (indicating approximately thirty feet).

Q. Were you ahead of Joe Valotta, or was Joe Valotta ahead of you?

A. I was on this side of the sidewalk, and he was on this other side.

Q. But you were both on the same side of the street, weren't you?

A. When he did the first shooting, yes, sir.

Q. And when he did the second shooting weren't you on the same side of the street with him?

A. No, sir.

Q. He was on the other side of the street?

A. Yes, sir.

Q. Which side of the street were you on, the left or the right hand side as you went towards Brighton Road?

A. I was on the left hand side.

Q. You were on the side then opposite from the church?

A. I don't know anything about the church.

Q. Well, I show you Exhibit 7, and ask you if you recognize that photograph?

A. I can't understand the photograph; I was on the left.

Q. And was he on the opposite side of the street?

A. On the other side of the street, on the side where the police officer fell.

Q. And did you see the police officer fall?

A. Yes, sir.

Q. And did you know he was a police officer at the time he fell?

A. No, sir, when I passed, then I knew him by the cap.

Q. And you passed about as far as from where you are sitting to where Mr. Morgan is here, about 15 to 18 feet, and you could see the cap, is that right?

A. I saw him when he was on the sidewalk, and I passed by him, and saw he had a cap.

Q. While you were running up Freedmore Street, after the first shot was fired, do you know whether or not the police officer passed you before he was shot by Valotta?

A. No, I can't tell, because as I said I was almost astounded there, I was taken by surprise and frightened.

Q. When did you see Valotta after the shooting of the police officer?

[fol. 105] A. When we were arrested.

Q. When were you arrested?

A. I can remember that.

Q. Well, how long after the shooting?

A. Two days afterwards.

Q. Where were you when you were arrested?

A. I was sleeping in my own home.

Q. And had you seen Valotta between the time he shot the police officer and the time you were arrested?

A. No, sir.

Q. When you separated from him that night at the corner of Brighton Road and Freedmore Street, that was the last you saw of him?

A. After the shooting I didn't see him no more.

Q. After you were arrested, and after Valotta was arrested, did you go to the North Side, to Freedmore and Irwin, in company with Mr. Edeburn and Mr. Morgan?

Mr. Ammon: I ask for an offer as to what is proposed to be proved.

Mr. Estep: I propose to prove by this witness that he went to the North Side with Mr. Edeburn and Mr. Morgan, in company with Valotta, after their arrest, and that he there pointed out the various places that have been marked on these photographs that have been offered as Exhibits, and testified to by Mr. Edeburn as the places given to him by this witness and Valotta, from where the measurements were made.

Mr. Ammon: Objected to, because it is a self-serving declaration, and this witness is the Commonwealth's witness, and he can ask him any question he wants without going into details.

Objection overruled.

Exception noted.

Q. After you were arrested, and after Valotta was arrested, did you and Valotta, in company with officers Edeburn and Morgan go to the North Side at Irwin and Freedmore Street?

A. Well, we were both under arrest at the time we went there.

Q. You went to the North Side in company with these two officers?

A. Yes, sir.

Q. And did you, on that trip, point out to Mr. Edeburn and Mr. Morgan the various places that you had stood in, and the various places you were at when the shots were fired that night?

A. They asked me only this question "Where were you at the time Valotta did the shooting," and I said "I was here." And they asked me then "Where did the police fall?" And I said "Fell here," that's all.

[fol. 106] Q. I show you Exhibit No. 5, and ask you if that is your photograph and Valotta's photograph on that Exhibit?

A. Yes, sir.

Q. I will show you Exhibit No. 5 again, and call your attention to the position you and Valotta occupied on the sidewalk in that Photograph, and I will ask you whether or not that is the position you occupied the night that you turned up Freedmore from Irwin, the night of the shooting?

A. No, sir.

Q. Showing you Exhibit 6, can you tell us where Valotta was standing at the time he shot Hopkins?

A. I can tell you precisely, but not on the photograph.

Q. How far away from the corner of Freedmore and Irwin, where the shooting took place, did you live, how many squares?

A. About seven, eight or ten minutes of a walk.

Cross-examination.

Mr. Ammon:

Q. You and Valotta were alone at the time you approached Irwin Avenue and Freedmore Street?

A. Yes, sir.

Q. The rest of your crowd had separated from you some time before that?

A. Yes, sir, that had gone ahead of us to some other place.

Q. When you saw the drunken crowd at the corner there, then you and Valotta detoured around them on the surface of the street into Freedmore Street from Irwin Avenue?

A. Yes, sir.

Q. And you weren't on the sidewalk at all of Freedmore Street up to this time, were you?

A. When we turned, then we turned on the sidewalk.

Q. When did Hopkins separate himself from his crowd there?

A. When we were passing that way he separated.

Q. At the time that this shot was fired was your back to the wall, and was *B*alotta's back to the wall?

A. Yes, sir.

Q. And was Hopkins in front of you?

A. Yes, sir.

Q. And was Hopkins making a demonstration of violence there with his fists?

A. Yes, sir.

Q. How far away was he from Joe Valotta?

A. Well, as far as from where I am sitting to this juror here, but the distance was diminished as he was approaching us.

Q. This man Hopkins had said something that you couldn't understand?

[fol. 107] A. Yes, sir.

Q. Then Valotta said something in English you couldn't understand?

A. He was talking in American too.

Q. Then the shot was fired?

A. Yes, sir.

Q. And Hopkins exclaimed "Oh my God."

A. No, the police said that.

Q. Then Hopkins didn't say anything when he fell down?

A. No, sir.

Q. Then Valotta started to run up Freedmore Street?

A. Yes, sir.

Q. And you still stood along the wall there?

A. Yes, sir.

Q. And then somebody passed you on Freedmore Street?

A. I didn't see anybody. As I said I was astounded and frightened.

Q. The first thing you knew the policeman was shot was when you passed his body as he was lying down on the street?

A. Yes, sir, the police was lying there on the ground when I saw him.

Q. Was there a lot of fog that night?

A. Yes, sir.

Q. And how far could you distinguish or identify a person, generally, at that time?

A. As far as from here to where the District Attorney is sitting, a little more or less, I can't judge.

TESTIMONY OF MRS. MARY RANDAZZI

MRS. MARY RANDAZZI sworn and examined through the official Italian interpreter.

Examination by Mr. Estep:

Q. What is your name?

A. Mary Randazzi.

Q. Where do you live?

A. 917 Lysle Street.

Q. Do you know Joe Valotta?

A. Yes, sir.

Q. How long have you known him?

A. Six years.

[fol. 108] Q. And how far from your house did Joe Valotta live on the 30th of October of last year?

A. I don't remember where he was at that time.

Q. Did you know where he lived?

A. Before he was near my house, and then he was living about two or three blocks away from my house.

Q. Did you read in the paper, or did you know that there had been a killing at the corner of Irwin and Freedmore, on the 30th of October of last year?

A. I didn't know anything, I don't know how to read the paper.

Q. Well, you have a back yard to your house, have you?

A. Yes, sir.

Q. Did you find anything in that back yard?

A. A revolver.

Q. Do you know when you found that revolver in your back yard?

A. I don't remember, either Tuesday or Wednesday.

Q. I show you Exhibit 9, and ask you whether or not you ever saw this before (showing revolver)?

A. I saw it when I picked it up in my yard.

Q. And did you open it to examine the chambers?
A. No, sir.
Q. What did you do with it after you found it in your yard?
A. I was afraid to handle it, and when my husband came I gave it to him. When the police officer came my husband turned the revolver over to the police.
Q. Do you know Mr. Morgan here?
A. Do you mean the police officer?
Q. Yes.
A. I can't recollect the appearance.

(Mr. Morgan requested to stand up.)

Q. Is that the man?
A. Yes, sir.
Q. Is that the man your husband turned the revolver over to?
A. Yes, sir.
Q. And when he turned it over to the police officer, do you know whether or not it had been opened or tampered with from the time you had found it in your yard?
A. No, nobody touched it.

(No cross-examination.)

[fol. 109] TESTIMONY OF JOHN J. MORGAN

JOHN J. MORGAN, sworn.

Examination by Mr. Estep:

Q. Where do you live?
A. 313 Cambric street, Mt. Washington, Pittsburgh, Pa.
Q. And I believe you are a City Detective?
A. Yes, sir.
Q. How long have you been connected with the Department?
A. Nineteen years.
Q. Were you assigned to investigate the killing of Thomas Hopkins and Edward Couch, that took place on the 30th of October of last year?
A. Yes, sir.

Q. Do you know who made the arrest of Valotta?
A. Yes, sir.
Q. Who?
A. I was one of them.
Q. Who was with you?
A. Frank Boyd, Frank Dodson, Captain Leff, Commissioner Deasey, and several other police officers.
Q. Where did you arrest him?
A. On Broadway, Pitcairn, Pa.
Q. At whose home?
A. At the home of some Italian—I can't tell the name correctly.
Q. Is it Medicino?
A. Yes, sir.
Q. When did you make the arrest?
A. Sunday morning, November 5th, about twenty minutes after five in the morning.
Q. That was the following Sunday after the shooting then?
A. Yes, sir.
Q. Do you know the woman that was just on the stand, who testified in regard to the gun?
A. I have seen her, and I know she is Mrs. Randazzi.
Q. Have you ever been at her house?
A. Yes, sir.
Q. Was there anything turned over to you by her?
A. No, by her husband.
[fol. 110] Q. Was she present in the house at the time?
A. We went to the house and talked in her presence, and the husband said he would have to go out of the house to get this revolver, and he took us out, detective Boyd and I, to the corner of —— Street and Lysle.
Q. I show you Exhibit 9, and ask you what that is?
A. That is the revolver given to Detective Boyd and myself by Mr. Randazzi.
Q. Was it loaded or empty when you received it?
A. It had five empty shells in it.
Q. As part of Exhibit 9, I show you five empty shells, and ask you whether those are the shells?
A. Yes, sir.
Q. What did you do with the empty shells and the gun after you received them?
A. Turned them over to Deputy Coroner Ewing.

Q. Were there any other cartridges in the gun except the five empty shells?

A. No loaded cartridges whatever.

Q. After you received this revolver from Mr. Randazzi, did you have a conversation with Valotta with reference to this gun?

A. Yes, sir.

Q. Did you show this gun to Valotta?

A. Yes, sir.

Q. Did Valotta say anything with reference to the gun, as to who owned it?

A. I showed Valotta this gun in the presence of Detectives Edeburn, Boyd, Deasy, Hickey and several other men, and he said it was his revolver, and the one he used at the shooting.

Exhibit No. 9 offered in evidence.

Q. After Valotta had been arrested did he make a statement in reference to the shooting of Hopkins and Couch?

A. Yes, sir.

Q. Where was that stat-ment made?

A. Up in the Superintendent's office in the City-County Building, City of Pittsburgh.

Q. Do you know whether or not that statement was reduced to writing?

A. He made a statement of his own, in his own language, and he made a statement that our stenographer, Bert Reed, took it on the typewriter.

Q. Did you see the statement taken by Mr. Reed on the typewriter?

A. Yes, sir.

(Statement marked Exhibit 10.)

[fol. 111] Q. I show you Exhibit 10, and ask you what that is?

A. That is the statement made by the gentleman in question that morning.

Q. I call your attention to a name written on the border of that statement, and ask you what that is?

A. Joe Valotta.

Q. Do you know who signed that statement there?

A. Yes, sir.

Q. Who?

A. Joe Valotta.
Q. Did you see him sign it?
A. Yes, sir.

(No cross-examination.)

TESTIMONY OF CLARENCE BROWN

CLARENCE BROWN sworn.

Examination by Mr. Estep:

Q. Where do you live?
A. 513 Grace Street, Mt. Washington.
Q. I believe you are connected with the police force of the City of Pittsburgh?
A. Yes, sir.
Q. And how long have you been connected with the Department?
A. Going on 17 years.
Q. On October 30th, 1922, and in the early evening of October 29th, 1922, were you on duty?
A. I was.
Q. What time did you go on duty that night?
A. Nine o'clock.
Q. From what station did you report at that time?
A. No. 12.
Q. Your beat was where?
A. Irwin Avenue.
Q. On Irwin Avenue entirely?
A. As far from North Avenue to Armandale.
Q. Do you know what officer patroled Irwin Avenue beyond Armandale?
[fol. 112] A. Officer Ed. Couch.
Q. Then he would be towards the City from Armandale, going down towards Pennsylvania Avenue?
A. Yes, sir.
Q. And you were out the other way?
A. Yes, sir.
Q. On the early morning of October 30th, 1922, in the neighborhood of 1:00 o'clock, or quarter after 1:00, where were you on your beat?

A. About 1:00 o'clock I was near North Avenue, it was just during my supper hour.

Q. When did you start back on your beat, about what time?

A. I pulled the box at 1:30 on North Avenue and Buena Vista.

Q. What time did you hear that morning that a shooting had taken place at the corner of Irwin and Freedmore?

A. I judge from 18 to 20 minutes of 2:00 o'clock.

Q. And where were you at that time?

A. At the corner of Sampson Way and Irwin Avenue.

Q. That is how far from the corner of Freedmore and Irwin?

A. A slight two squares.

Q. Where did you go when you got that word?

A. I heard that first shot.

Q. Where did you go to then?

A. I hiked to the corner of Jackson and Irwin.

Q. Well, did you go to Irwin and Freedmore?

A. I did, after I heard the four shots.

Q. What did you find when you arrived there?

A. On my way up that gentleman there (indicating), the one who testified about coming running down to meet me, met me as I was running with my gun in my hand. This other man was in the middle of the street, and finally he takes to the left, the right side coming towards the City, and I got on the sidewalk and he stopped after he seen I was an officer, about twenty or thirty feet ahead of me. He says "Hurry up, there is two men shot up here." I ran up, and when I got to the corner two men were coming down Irwin meeting me. I throwed my mace under my right arm, and my gun in my hand and I searched him, and he nodded his head to me that he wasn't the man. I passed him up. I said "What is the excitement?" He said "Nothing." Then I walked about twelve feet further, and there lay Tommy Hopkins.

Q. Where?

A. In the street, from six to seven feet away, and his head was laying towards the curb.

Q. How close was his head to the curb?

[fol. 113] A. About six or seven feet perhaps.

Q. From the curb?

A. Yes, sir.

Q. After you saw Hopkins lying there, what did you do?

A. I called across the street, and asked if they had a telephone, and I took my flash-light and looked in his face and I saw he was dead. I went across to the house and asked the lady if she knew me and she says yes, and she sent some young fellow down and says to let the officer in. I told her what happened, and told her to get some men down with the wagon as soon as possible. The lady upstairs says "That man isn't dead, I hear him moaning." I thought she made a mistake, because I knew he was dead. I walked out and stood across the street looking for the wagon, and looking at Tommy at the same time and this man was there with me. In the meantime Rodgers and Brady ran back, and one of the- hollered down and says, "Hey, Brown here is Couch over here." That was the first I knew he was anywhere around. I goes over, and he was lying about 30 feet beyond McCullough street, with his head toward the fence, where the iron fence and boards connect. I leaned down over him and took the gun out of his hand. I asked him—I says "Where are — hit, Ed?" He says "They got me in the stomach." I says to them, "Help to raise him up," and they set him up on the curb. He says to me "Put me back again." We laid him down and then I breaks for the house to call for the ambulance. The Sergeant says "You go out there and look for the wagon, it is due there now." When I got out the wagon was just *cor*ssing over Jackson street. I got out on the street and waved the wagon down, as it went down Armandale street. Two lieutenants got out, and they says "Where is Couch?" I says "Laying beyond McCullough street," and I guided the wagon out past Tommy, and they got the stretchers out and put him in the wagon.

Q. Where did you take Tommy?

A. Tommy was still laying there. The wagon made a trip to the hospital immediately, and then put Tommy in the patrol wagon and took him to the Morgue.

Q. First the wagon took Couch to the Presbyterian Hospital?

A. Yes, sir.

Q. I show you Exhibit 4, and ask if you know what that is?

A. That is a Smith & Weston gun.

Q. Whose gun is it?

A. Edward Couch's.

Q. When you saw that gun that night was it in or out of the holster?

A. It was out of the holster in his right hand, and the holster was laying by the side of him on the side walk.

[fol. 114] Q. Did you examine the gun as to whether or not it had been fired?

A. I did.

Q. And was it loaded, or were there any empty or discharged shells?

A. There was five shells in it.

Q. Loaded shells?

A. Yes, sir.

Q. Were there any empty shells in it?

A. There was an empty chamber and no shell in it. We aim to carry the gun with an empty chamber.

Q. There were five loaded cartridges and one empty chamber?

A. Yes, sir, had he pulled the trigger he would have missed, it would only have throwed the empty chamber under the hammer.

(Exhibit No. 4 offered in evidence.)

Cross-examination.

Mr. Ammon:

Q. How many full chambers were in the officer's gun?

A. Five.

Q. Was it a six-shooter?

A. A six-shooter.

Q. There was an empty shell in it?

A. No shell,—an empty chamber.

Q. Was that empty chamber under the hammer?

A. No, sir.

Q. Where was it?

A. Just beyond.

Q. Just beyond the firing place?

A. Yes, sir.

Q. Is it an automatic?

A. He would have throwed the empty chamber under the hammer.

Q. He would have throwed the empty chamber under the hammer?

A. Yes, sir, if he had pulled the trigger.

Q. If the man had attempted to shoot there would have been no explosion or ball fired at all?

A. No, sir.

Q. Is that the way police officers usually carry their gun, that they won't shoot when they fire?

[fol. 115] A. It is a safe habit. Naturally when you pull the trigger it throws the loaded shell under the hammer.

Q. Is it a habit of the police officers to have one empty chamber in the gun?

A. Mostly, as a general thing.

Q. What is the idea of that?

A. For safety—in case you *g*rop your gun there is no explosion.

Q. You had heard there were two men shot before you got there?

A. Yes, sir.

Q. From whom?

A. From the third man sitting in the front row there.

Q. Mr. Conoran?

A. Yes, sir.

Q. When you got there you only saw one shot?

A. Only saw one; he said nothing about Couch at the time.

Q. How long was Couch on that beat?

A. I couldn't tell exactly, but I was on that beat—that is, as far as Armandale Street is concerned, 11 years last November. Officer Couch at that time, when I had taken that beat, we pasesd each other on Buena Vista Street,—went to Perrysville Avenue, and came down Buena Vista, and then up Buena Vista to Perrysville Avenue, and that was sixteen years ago last November. I don't know how long he was on there before that.

Q. He was on there at least eleven years?

A. Yes, sir.

Q. You didn't know Couch was shot until Brady came back and told you?

A. No, sir.

Q. Had you seen Brady around there when he was examining Hopkins' body?

A. No, sir.

Q. Where did he come from?
A. He come in from towards the Brighton Road.
Q. Where was he when you first saw him?
A. Brady?
Q. Yes.
A. I judge he was standing about 20 feet, or something like that, from Irwin Avenue on Freedmore, when he hollered to me.
Q. He was quite close to you?
A. Reasonably close.
[fol. 116] Q. Right up against you?
A. No, sir.
Q. How many feet would you say he was away from you?
A. About 20 feet or something when he hollered.

TESTIMONY OF DOMINIC RANDAZZI

DOMINIC RANDAZZI sworn.

Examination by Mr. Estep:

Q. You are the husband of Mrs. Randazzi who was just on the stand?
A. Yes, sir.
Q. I show you Exhibit No. 9, and ask you if you ever saw this gun before?
A. Yes, sir.
Q. Where did you see it?
A. My wife found it and gave it to me.
Q. What did you do with it?
A. Took it home, and the cop come and I gave it to him.
Q. Is that the cop (indicating Mr. Morgan)?
A. Yes, sir.

(No cross-examination.)

Afternoon Session

TESTIMONY OF ANTONIO VALOTTA

ANTONIO VALOTTA, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows with the aid of an interpreter:

Direct examination.

Mr. Estep:

Q. Your name is Antonio or Tony Valotta?
A. Antonio Valotta.
Q. You are a brother of Joe Valotta, the defendant in this case?
[fol. 117] A. Yes, sir.
Q. Where do you live?
A. 912 Lysle street.
Q. Did you live at 912 Lysle street on October 30, 1922?
A. Yes, sir.
Q. Where did your brother, Joe Valotta, live at that time?
A. Same place where I was living, together with me.
Q. On the evening of October 29th, where were you?
A. There was a party going on at the house of Dominic Randazzi, and I was there.
Q. That is the man that was on the stand a few minutes ago?
A. Yes, sir.
Q. And that was at 917 Lysle street?
A. I believe so.
Q. What time did you leave Randazzi's place?
A. About eleven o'clock.
Q. Where did you go from there?
A. I don't know the name of the street, but we were taken to another house by a person named Sam Lococo.
Q. Who went with you from Randazzi's house to Lococo's house?
A. Five musicians, my brother, Joe Palermo, Joe Restivo, another man by the name of Rocco. I don't know his family name. And myself. I don't know if there was somebody else.

Q. By your brother you mean Joe Valotta?
A. Joe Valotta.
Q. What time did you leave Lococo's house?
A. About one o'clock.
Q. Did you all leave together?
A. Out of the door we came out together.
Q. Did you separate after you left the house?
A. As soon as we left the house.
Q. Where did you leave Joe?
A. At the corner of the house there. They were talking.
Q. Who was he with when you left?
A. Palermo.
Q. Did you go away with the other men?
A. Yes sir.
[fol. 118] Q. What time did you arrive home?
A. A few minutes after then. I left there and I went to the house directly.
Q. When did you next see Joe, your brother?
A. About five or six o'clock in the morning.
Q. Where?
A. At the house.
Q. Were you in bed or out of bed when he came in?
A. When he came to the house I didn't hear him.
Q. Then how did you know he was in the house?
A. In the morning, when I saw him in the morning.
Q. Did he awaken you, or how?
A. I don't know, I can't remember, because I had drank about ten or fifteen glasses of wine, and I can't remember all this stuff.
Q. Did he call you into his room or did he come into your room?
A. I don't remember.
Q. Did you talk to him?
A. Certainly I did in the morning.
Q. What time in the morning?
A. I can't tell you. Perhaps around six o'clock.
Q. What did he say to you at that time?
A. The proper words he said, he said, "Watch the family, because they want to kill me, and I did some shooting. Whether I kill one, I kill two, I don't know."
Q. Did he say who he had killed?
A. No, sir. This is the truth.

Q. Is that your signature on that statement, that paper?

A. This is my signature, but I can't tell you precisely what I said there, because after they arrested me I could have said anything.

(Paper marked Exhibit 15.)

Q. You made a statement on the 1st day of November, 1922?

A. Yes, sir, I made a statement; but I had to make a statement to protect myself, because I was under arrest and I didn't know what they were going to do to me.

Q. You were examined by Michael J. Feeney, city detective, at the time you made the statement? Just answer my question yes, or no, whether you were examined by him?

A. Maybe so.

Q. And you signed this statement? That is your name on the bottom of it there, isn't it?

[fol. 119] A. Yes, sir, that is my name. I only know how to write my signature.

Q. And you were asked this question: "When did you next see your brother?" and you replied, "Half past four in the morning."

A. I may have answered that way but I was all confused, I didn't know what to say at that time.

Q. You were asked, "Under what circumstances?" and you said, "He called me in his room." Is that right?

A. I said it, but the whole statement there is to protect myself.

Q. And you were asked, "Did he have anything to say to you?" and you answered, "He only said a few words." That's right, isn't it?

A. Yes, sir.

Q. And you were asked, "State exactly what he said," and you answered, "He says, 'I killed two men, a man and a policeman;' he says, 'You take care of my children, because if they get me, they hang me.' That's all he said." Isn't that what you told on that examination and the statement that you signed on that day?

A. I had to say that in order to protect myself, because I was under arrest and that was something that they wanted to put against me.

Q. What did you need to protect yourself for?

A. Why, why did the police come and arrest me for nithing?

—

A. Well, they kept me sixteen days in jail.

Q. You made this, though, on the day after the killing?

A. I don't know when I made that. I don't know how to read and write.

Q. Do you know Michael Tortorelli?

A. If I see him, certainly.

Q. (Michael Tortorelli.)

A. Certainly I do.

Q. Is he the man that interpreted your statement at the police station on the 1st of November, 1922?

A. Yes, sir; he was the interpreter.

Mr. Estep: I offer in evidence Exhibit No. 15, particularly beginning at the question, "When did you next see your brother," down to and including the answer, "He says, 'I killed two men, a man and a policeman,' and says, 'You take care of my children, because if they get me they hang me.' That's all he said." Particularly that section I just outlined.

Mr. Ammon: This offer is objected to for the reason that Mr. Estep has put the witness on the stand as a witness for [fol. 120] the Commonwealth, he has manifested no hostility whatever, and Mr. Estep has made no formal offer that the witness is hostile; and under the laws and the rules of evidence I do not think that Mr. Estep has either any right to cross examine a witness that is not hostile or offer in evidence any document that would tend to make his own witness out a liar.

Mr. Estep: I am not. I am giving what he swore to and what he signed.

Mr. Ammon: For what purpose?

Mr. Estep: To contradict him. I plead surprise with this witness and offer that in evidence.

Mr. Ammon: Objected to, that the witness has shown no hostility.

The Court: Don't you think you had better lay a better foundation for the admissibility of this?

Mr. Estep:

Q. You did make these statements at the police station?

A. I don't remember whether I did or not.

Q. You signed this paper?

A. If they ask me to sign this paper, what do I know what I sign.

The Court:

A. Ask him if he signed it.

A. Yes, sir, I signed it. I don't know what.

Mr. Estep:

Q. This man interpreted what you said on that date?

A. He was the interpreter.

Q. You did say then at the police station, when you were asked, 'State exactly what he said,'' you answered, ''He says 'I kill two men, a man and a policeman,' he said, 'You take care of my children because if they get me they hang me,' and that's all he said.'' You did say that, didn't you?

A. I don't remember whether I said that or not.

Q. Did he tell you on that night what he had done with his gun?

A. I don't remember.

[fol. 121] Mr. Estep: I plead surprise with this witness.

Mr. Estep:

Q. Isn't it a fact that you told the police officer where he could find the gun and told him that your brother had told you where he threw it?

A. I don't remember whether I said that or not.

Q. And isn't it a fact that in this statement that you made, you were asked, ''Did your brother say anything to you about a revolver?'' and didn't you answer, ''He told me that he threw the gun he used in Randazzi's yard?''

A. I don't remember. It is four months past. I don't remember what I said there, and——

Q. Well, did you tell the police officers, remembering from the present moment—did you tell the police officers that your brother had told you that he threw the gun in Randazzi's yard?

A. My memory is bad. I can't tell whether I said that to the police or not.

Q. When did your memory become bad?

A. It is since I was discharged from the army, I have been sick and my memory fails me.

Q. When were you discharged from the army?

A. In 1919.

Q. Well, but this was in 1922, when you made this statement?

A. But it is since 1920 I am sick.

Q. Well, but you remember now, you told this jury that your brother came home that morning around six in the morning and you had a talk to him, didn't you?

A. I remember that I talked to him, but I don't remember what I said.

Q. And you remember that he told you to take care of his family?

A. I remember some words, yes.

Q. But you don't remember the particular part where he said he killed a man and a policeman? You forgot that?

A. I can swear that he did not tell me that way.

Q. And will you swear that you did not tell the police officer where to go and get the gun?

A. I don't remember this.

Q. When did you find out that a policeman had been killed?

[fol. 122] A. When I read the paper. It was when my brother read it in the paper in the morning. I don't know how to read in English or Italian.

Q. What brother was that?

A. My brother Joe.

Q. Then Joe read it to you in the morning before you were arrested?

A. I was arrested two days after.

Q. On the morning after Joe came home at six he read in the paper about the policeman being killed, did he?

A. He read in the paper then, and then he told me.

Q. Did he tell you then who had killed the policeman and the man?

A. He said that he had shot two and that the people don't know whether they are alive or dead.

Q. You mean that this was in the paper the following morning and at that time when he read the paper to you the people didn't know that either of these men were alive or dead?

A. The truth of the matter is this: he had not told me anything at all about this affair, except after he read the paper, I learned that the two men were killed, and then

he *he* told me, he said, "Brother, I killed these two men, because they wanted to kill me."

Q. Then he did tell you that he had killed two men?

A. It was afterwards, yes, sir. This is the honest truth.

Q. When was that that he told you that he had killed the two men?

A. Six or half past six in the morning.

Q. And wasn't that the first time that you saw him after you had left him at one o'clock in the morning?

A. Certainly.

Q. Now, I will ask you if you did not make another statement in the office of the superintendent of police on the 9th of November, 1922, at ten thirty in the morning?

A. I believe so.

Q. And wasn't your brother Joe here present at the time you made this second statement?

A. Yes, sir, he was there.

Q. And Mr. Tortorelli was the interpreter on the occasion that you made the second statement on November the 9th?

A. I don't remember. Maybe he was there, maybe not. I can't tell you.

Q. I show you this and ask you whether or not you did not sign this statement?

A. Yes, sir. It is my name.

[fol. 123] Q. Were you still frightened about trying to protect yourself on the 9th of November?

A. Certainly, I was arrested, I didn't know what they were going to do with me.

Q. Now, didn't you say on that ocasion, when you were asked, "When did you next see your brother?" meaning after the time you had left him at one o'clock in the morning, and you replied, "In the morning when he called me in and revealed to me what he had committed." Did you say that?

A. Maybe I said, but I want you to understand that I did that to protect myself because I was under arrest.

Q. And you were asked, "What time was that?" and you replied, "About half past four." Did you say that?

A. I do not know what I said, whether I said half past four or not, I do not remember that very well, because I was frightened.

Q. You were asked "When did he call you to?" and you answered, "Into his room." Did you say that?

A. I said it, but he did not call me in his room.

Q. You said it, but he did not do it?

A. No, sir.

Q. Well, why did you say it?

A. I don't know whether they want to send me up for ten or twenty years. I don't know what to do.

Q. What difference did it make whether he called you into his room or you called him into yours on that occasion?

A. I don't know what would be the difference, because I always thought to put that much in.

Q. And you were asked, "For what purpose?" and you answered, "He said he killed two men, a man and a policeman." Did you tell them that on the 9th of November or nine days after your first statement?

A. I said it, but not because my brother said it.

Q. And you were asked, "State exactly what he said," and you answered, "He said for me to take care of his children, for if they get me they will kill me." Did you say that?

A. He said about the family, what he said about the family is true, but all the rest that I said there came from my mouth, not that he said it, as I wanted to protect and save myself.

Q. Then you remember the part that he told you about the family?

A. I remember some words, yes.

Q. So your memory was not so bad as you make out it is?

A. I don't want to make you to believe it in that way, because such is the fact, and whatever I say you may send me up for twenty years, but what I said comes out of my mouth.

[fol. 124] Q. We don't dispute that.

"Q. Is that all he said?"

And you answered, "That's all he said then. Then he afterwards told me about the revolver." Did you tell that over there?

A. I can't remember that.

Q. And then you were asked, "Did your brother tell you anything about a revolver?" and you answered, "He said he threw it in Randazzi's yard when he was running." Did you answer that?

A. I don't know. I don't know what I said.

Q. How did you know the gun was in Randazzi's yard?

A. I don't remember. Maybe I said that, maybe I didn't say it. I don't remember.

Q. Well, if you said it was in Randazzi's yard, you knew it was there, didn't you?

A. Maybe I said it.

Q. Well you knew the revolver was afterwards found in Randazzi's yard—don't you?

A. I don't know whether they found it there or not.

Q. Well, you heard Mrs. Randazzi and her husband testifying this morning on the stand, didn't you?

A. It is what I hear here. What do I understand? I don't know.

Q. Then if you did say that he said he threw it in Randazzi's yard, you were just guessing at the place and didn't know anything about it?

A. I don't say that. I don't say I was guessing at all. Maybe he told me, maybe I said, but I say I don't remember.

Q. Don't you know that it was after the statement that you made that the officers went over to Randazzi's and recovered the gun?

A. I do not know. Maybe they found it after, maybe they found it before. I don't know anything about it.

Q. Isn't it a fact that the gun was brought in in your presence and your brother's presence in the police station over here, and that you identified it at the same time that he identified it?

A. Yes, sir.

Q. And it was brought in after you had told the police officers where your brother said he had thrown it?

A. Maybe I said it. I don't deny that I said, but I don't remember.

Q. And didn't you put a big "X" on the revolver when it was brought in after the officers had recovered it in Randazzi's house?

A. Yes, sir, I did.

(Paper marked Exhibit 16.)

[fol. 125] Mr. Estep: I offer in evidence Exhibit No. 16, and more particularly beginning at the question, "When did you next see your brother," down to and including the answer, "He said he threw it in Randazzi's yard when he was running."

Mr. Ammon: These respective offers, if your Honor please, are objected to for the reason that each of those exhibits are self-serving declarations on the part of the witness, that they are immaterial, incompetent and irrelevant; and third, that the learned district attorney is making an attempt to contradict his own witness.

Mr. Estep: I am not making any bones about that. I have pleaded surprise and cross examined my own witness on the basis of a statement made by him on the 9th day of November, signed by him and properly witnessed in the presence of a number of people, and particularly to a certain section of that statement.

The Court: Does he admit that he did sign in these two different places?

Mr. Estep: Yes.

The Court: His own signature, if he admits that, then you are not obliged to bring the officer here to prove such a paper. Then the foundation is laid to cross examine your own witness who has been hostile. And it is a question for the jury to determine whether or not they are material. I think the foundation has been laid by the introduction of testimony, where a witness appears hostile and surprise is plead. The witness on the stand admits the signing of all these papers. One was made before the superintendent of detectives on November 1st; the other on November 9th before the superintendent of police. Then that furnishes sufficient foundation for the introduction of testimony to contradict his own witness.

Exception noted.

EXHIBIT NO. 16 TO TESTIMONY OF ANTONIO VALOTTA

"Statement of Antonio Valotta, given at the office of John C. Calhoun, Superintendent of the Bureau of Police, Thursday, November 9th, 1922, at 10:30 A. M.

Examination by Michael Feeney, Michael Tortorelli first duly sworn as interpreter. Typewritten by Burke R. Read. Witnesses: Joseph Valotta, Joseph Palermo, John Hickey, John Morgan, H. T. Ewing, C. S. Edeburn, Antonia Valotta, first duly sworn by S. Lee McBride.

Q. What is your name?
A. Antonio Valotta.

Q. Where do you live?
A. 912 Lysle Street.
Q. What is your age?
[fol. 126] A. Thirty-three.
Q. Marries or single?
A. Single.
Q. Where were you on Sunday evening October 29th, 1922?
A. I was at home, then I went to a party at Dominic Randozzo's house, at 917 Lysle street.
Q. What were you doing there?
A. I was a guest at a party.
Q. How many were in the party?
A. About fifteen or twenty.
Q. Can you name some of the party?
A. Donato Grippo and his son, Louis Suppa, Veto Grando, Niria Titta, Joseph Palermo, Joseph Restivo, Joseph Emilia, Frank Grippo, Lamardo Talotta and my brother Joseph Valotta and five musicians.
Q. After the party what did you do?
A. I went to another party at Sam Lacocca's.
Q. What time did you get to this house of Lacocca's?
A. I don't exactly remember but is was between twelve or one. I had no watch in my pocket and did not know the exact time.
Q. How long did you stay there?
A. We played several pieces and then we went out.
Q. Then where did you go?
A. After the musicians took a car then we went home.
Q. Who went home with you?
A. Lamardo Talotta, Joseph Restivo, Rocco, I don't remember his last name, and we started up Monterey street to go home.
Q. What way did your brother and Palermo go?
A. Down Taylor avenue.
Q. Then where did you go?
A. I went home.
Q. What time did you get home?
A. I didn't have no watch, but I imagine it was half past one or quarter to two.
Q. When you got home was your brother home?
A. No.
Q. When did you next see your brother?

A. In the morning when he called me in and revealed to me what he had committed.

[fol. 127] Q. What time was that?

A. About half past four.

Q. Where did he call you to?

A. In his room.

Q. For what purpose?

A. He said he killed two men, and a man and a policeman.

Q. State exactly what he said?

A. He said for me to take care of his children for if they get me they will kill me.

Q. Is that all he said?

A. That's all he said then, then he afterwards told me about the revolver.

Q. Did you brother tell you anything about a revolver?

A. He said he threw it in Randozzo's yard when he was running.

Q. Did he leave the house then?

A. No, he did not.

Q. When was the next time you saw your brother?

A. This is the first time I have seen him.

Q. Is this all you know about this case?

A. That is all.

Antonio Valotta.

Sworn and subscribed before me this 9th day of November, A. D. 1922. S. Lee McBride, Notary Public. (Seal.) My commission expires March 1, 1923.

Witnesses: Palermo Giuseppe, Joe Valotta, John Hickey, John J. Morgan, H. T. Ewing, M. J. Feeney, Michael Tortorelli, Frank R. Boyd, C. S. Edeburn, Burke F. Read."

[fol. 128] Q. What time did Joe Valotta, your brother, leave the house on that Monday after he had told you to take care of his family?

A. I don't know.

Q. What time did you leave the house?

A. About six o'clock, fifteen after six.

Q. Where did you go?

A. To work.

Q. When did you come home again?

A. In the evening.

Q. Was your brother Joe at the house when you returned n the evening?

A. No, sir.

Q. When did you see him next?

A. At the time he was arrested.

Q. Did you know where he was between the time you ame home on that Monday evening and the time that he was arrested?

A. No, sir.

Q. Did you have any conversation with Mr. Edeburn in regard to your brother's whereabouts?

A. Well, how could I tell him where my brother would be if I didn't know? He talked to me about it, and I answered, yes.

Q. Do — know where Coatesville, Pennsylvania is?

A. I was never there. I don't know.

Q. Have you ever heard of the place?

A. I heard of the place, yes, sir.

Q. Did you know at the time that Joe's brother-in-law owned a farm outside of Coatesville?

A. I was never there. I don't know whether he had it or not.

Q. Didn't you tell Officer Edeburn that you thought Joe had gone to Coatesville to hide on the farm?

Mr. Ammon: That is objected to.

Mr. Estep: I plead surprise again with this witness and ask leave to cross examine him. I knew what I was going to get when I put him on; but I wasn't going to leave him off. I wanted the jury to hear this fellow.

Mr. Ammon: I objected to that remark. I object to that question for the reason that it is immaterial and irrelev nt. There is no evidence here that the man at any time wen to Coatesville or was anywhere near it.

[fol. 129] The Court: That is not the question. The question is whether or not he told the officer that.

Mr. Ammon: Well, it is a mere expression of opinion.

The Court: It is not very material. I don't think I would press it.

Mr. Estep: We will withdraw it.

Cross-examination.

Mr. Ammon:

Q. I guess, Tony, you were pretty badly scared when you found out your brother was in trouble?

A. Certainly I was scared.

Q. And I guess when the police got hold of you you were pretty near willing to tell anything they told you to say, weren't you?

A. Yes, sir, because Edeburn came there and started to swear, say "God damn," right in my house.

Q. Well, I guess you would have signed any paper that Edeburn told you to sign after he swore at you?

Mr. Estep: Objected to for the reason that the witness under cross examination before has already testified that everything he said that was on that paper came out of his own mouth and was his own make up.

The Court: And did not remember any of it, because he was nervous and wanted to protect himself.

Mr. Ammon:

Q. Well, now, Tony, when did they put you in jail?

A. On Tuesday.

Q. And they kept you there for sixteen days?

A. Yes, sir.

Q. And they let you out?

A. Well, the police officer told me first that I would come out on two thousand dollars bail, and then he came on again and said, "We reduced it to three hundred dollars," and I came out on three hundred dollars bail.

[fol. 130] Q. You say now that as far as you can recollect it was in the morning about six or six thirty, after your brother had ascertained from the newspapers that one of the men that was shot was a policeman, that you and he both found out for the first time it was a police officer that had been shot?

Mr. Estep: Objected to for the reason that the question assumes a proposition that was not testified to by the witness, and that the answer "Yes," would be misleading, and not the proper answer as to the facts already having been testified to by the witness.

(Testimony read, as follows: "Q. When did you find out that a policeman had been killed? A. When I read the paper, it was when my brother read it in the paper in the morning. I don't know how to read in English or Italian.")

(Question read.)

A. Yes, it was afterwards.

Mr. Estep:

Q. You were in jail weren't you, awaiting the coroner's inquest as a material witness? Isn't that right?

The Interpreter: He says, "They held me as an ordinary." I don't know what he means by it.

Mr. Estep:

Q. And when you gave your bond of three hundred dollars it was the bond to appear as a witness in the case. Isn't that right?

A. I don't know what they did.

TESTIMONY OF MICHAEL TORTORELLI

MICHAEL TORTORELLI, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. Your name is Michael Tortorelli?
A. Yes, sir.
Q. Where do you live?
A. 51 Boundary street.
Q. What is your business?
A. Police officer.
Q. For the City of Pittsburgh?
A. Yes, sir.
Q. I believe you are an Italian?
A. Yes, sir.
[fol. 131] Q. And you speak the Italian language?
A. Yes, sir.

Q. Were you present in the office of John C. Calhoun, superintendent of the bureau of police of the City of Pittsburgh on Thursday, November 9th, at a time when Joseph Valotta, the defendant, was there?

A. Yes, sir.

Q. Where you present at a time that he made a statement in reference to certain shooting that happened on the 30th of October of last year?

A. Yes, sir.

Q. Did he make that statement in the English or Italian language?

A. In the Italian language.

Q. All of it?

A. All of it.

Q. Who acted as interpreter at the time?

A. I did.

Q. I show you Exhibit No. 10, and ask you whether or not you know what it is?

A. Yes, sir.

Q. What is it?

A. This is Joe Valotta.

Q. You mean a statement by Joe Valotta?

A. A statement, yes, sir.

Q. Did you interpret that statement?

A. I did.

Q. Who took the statement down at the time you were interpreting?

A. Why Burke, one of the clerks in the superintendent's office.

Q. Mr. Read?

A. Burke Read, yes, sir.

Q. Did he take it down in shorthand or did he take it down on a typewriter as it was interpreted to him?

A. On a typewriter.

Q. Was that statement signed by Joe Valotta?

A. Yes, sir.

Q. Did you see him sign it?

A. I did, yes, sir.

Q. Is that his signature at the end of it?

[fol. 132] A. Yes, sir

Q. Is that his signature on the first page of it?

A. On the first page, on the side here.

Q. Did you see it witnessed by the various men whose names are signed there?

A. Yes, sir.

Mr. Estep: I offer in evidence Exhibit No. 10, and ask you permission to read it to the jury.

Mr. Ammon: No objection.

(Exhibit 10 read to the jury by Mr. Estep.)

EXHIBIT 10 TO TESTIMONY OF MICHAEL TORTORELLI

"Statement of Joseph Valotta, given at the office of John C. Calhoun, Superintendent of the Bureau of Police, Thursday, November 9th, 1923, at 12:00 noon.

Examination by Michael Feeney. Typewritten by Burke F. Read. Michael Tortorelli duly sworn as interpreter. Witnesses: Joseph Palermo, Antonio Valotta, John Hickey, Harry Ewing, C. S. Edeburn, John Morgan, Frank Boyd, Josepr Valotta, first duly sworn by S. Lee McBride.

Q. What is your name?

A. Joseph Valotta.

Q. Where do you live?

A. 912 Lysle street.

Q. What is your age?

A. Thirty-nine.

Q. Married?

A. Yes.

Q. You understand this statement you are about to make about the murder of Thomas Hopkins and Patrolman Edw. Couch at the corner of Irwin avenue and Freedmore street, October 30th, 1922, Monday, may be used against you in court if we see fit?

A. Yes.

Q. Are you willing to make this statement in the presence of Joseph Palermo and your brother Antonio Valotta?

A. Certainly.

Q. You heard the statement of Joseph Palermo made just now in your presence, and also that of your brother, Antonio Valotta previous to Palermo's?

A. Yes.

[fol. 133] Q. Just tell in your own way what happened on Monday morning, October 30th, 1922, after you left Lacocco's.

A. I want to tell you in my own way from the beginning to the end. October 29th, 1922, I was at my Godmother's house, on 917 Lysle street. I had music there. This music I had there played until about half past eleven and Mr. Palermo come and he asked me to take this music down to Lococco's, at Monterey and Taylor avenue, I said it was too late. Palermo said come on, we will play a couple pieces, so we went. After we went to Lacocco's, the musicians started to play. Mr. Palermo and a couple other ones there started to dance. After they danced a couple pieces, we got a couple sandwiches and a couple drinks. Then we left, and when we was outside the musicians took a street car. Whenever they went we all got together, my brother Antonio, Romualdo Tallotta, Joseph Restivo and Rocco went together. Mr. Palermo and I walk together. We was walking slow, talking, and when we got to the corner of Irwin avenue and Freedmore street, there was five men standing. We passed down the street and one of them said look at the scab guinea, I told him to tend to his own business, he say you want to fight and he come toward me, I though- he come to lick me, I didn't wait, I pull out the gun and shoot him. I heard some one else running I pull out my gun and shoot him. Whenever I see him fall, that's the only time I know it was the police. I shoot too quick. Then I go home. I went up to Marquise street to Columbus avenue and threw the gun away in the yard of my godmother, Randazzo. I took a walk as far as the bridge, I stood around there awhile and come back home. When I got to the house and I went upstairs, I see my wife and my brother. I told him I shot the man and a police, I told my brother to take care of my family. I didn't know what to do. Then I went to bed, I laid down and slept until half past nine or ten o'clock, my wife saw the police outside, I started to shake, I didn't know what to do, and I went out. Monday night I sleep at the brick yard, Tuesday night I sleep in Veraldi's house, on Brighton Road, Veraldi asked me if I killed the police and I told him no. Next morning, Wednesday, I went to the east end, and I sleep in Nick Pruccio's house, on Stoebner street, I told

Nick what I done and Nick say I could stay a day or two, and no more as he was afraid. Thursday I went to my cousin Carmla Valotta, on Winslow street, and I told him what I did and stayed there one night. Then I came back to Nick Pruccio on Friday and stayed there Friday and Saturday and left there about five o'clock in the evening, and they got a car and took me to Pitcairn, Nick Pruccio and Jim Fabari had made arrangements to take me up there to Frank Mendingino.

Q. Who was in the automobile and how did they take you to Pitcairn?

A. Nick Pruccio, Jim Fabari, the driver, I don't know his name, another man that I don't know his name and myself.

Q. When did you stop after leaving the east end?

A. We stopped one place and I don't know where it was and didn't know the people.

Q. Did you stop anywhere else?

A. No.

[fol. 134] Q. About what time did you get to Pitcairn?

A. Between half past six or seven o'clock.

Q. What happened after you got in the house?

A. I went to sleep.

Q. Did you see Mendingini and talk to him before you went to sleep?

A. Yes.

Q. What was your conversation with Mendingini?

A. He asked me what's the matter, and I told him what happened, that I killed two men. He didn't say nothing. That was about ten or eleven o'clock.

Q. What time did the officer arrive the next morning?

A. About half past five.

Q. How did they get you?

A. They rapped on the door hard I stayed upstairs, I knew I was arrested, I put one sock on, and then all the officers came up to my room, I see three of them here in the room now. (Pointing to Detectives Frank Boyd, John Morgan and John Hickey.)

Q. How many times did you shoot the policeman?

A. I don't know how many times, I just come on shooting.

Q. Did you ever see this gun?

A. Yes.

Q. Is this your gun? (Smith & Wesson .38 calibre, No. 110470.)

A. Yes.

Q. Is that the gun you did the shooting with?

A. Yes.

Q. You told your brother where you threw the gun?

A. I don't remember whether I did or not, I know I told my wife.

Q. Did you tell your godmother about the gun?

A. She was up there when I told my wife about it.

Q. Would you be willing to take us over to the scene of the shooting and demonstrate just how it was done?

A. Sure.

Q. When you left home, did you have any idea where you were going?

A. At first I didn't, I was too excited, but afterwards I thought I would go to Coatesville, where my brother-in-law has a farm.

[fol. 135] Q. Have you made this statement of your own free will, without any promises or threats, and is it the truth?

A. Yes, sir, and it is the truth.

Joe Valotta.

Sworn and subscribed before me this 9th day of November A. D. 1922. S. Lee McBride, Notary Public. My Commission expires March 1, 1923. (Seal.)

Witnesses: Antonio Valotta, M. J. Feeney, Palermo Guiseppe, Michael Tortorelli, John Hickey, Frank R. Boyd, John J. Morgan, C. S. Edeburn, H. T. Ewing, Burke F. Read."

(Paper marked Exhibit 17.)

Q. Mr. Tortorelli, I show you Exhibit No. 17, and call your attention in particular to the pages headed "Department of Public Safety, Bureau of Police, and ask you what that is?"

A. Why, this is one of Joe Valotta's handwriting.

Q. Are all those pages with that heading on, "Department of Safety," in Joe Vallotta's handwriting?

A. Yes, sir.

Q. Did you see him write it?
A. I did, yes, sir.
Q. Is it in English or Italian?
A. In Italian.
Q. Did you translate that Italian into English?
A. Yes, sir. My translation is right attached to it.
Q. And calling your attention to the smaller pages attached to Exhibit 17, I will ask you if that is your translation of the pages attached to it?
A. Yes, sir.
Q. Now, I will ask you, having read Exhibit No. 16, the exhibit I just read to the jury, whether or not the translation of the statement made by Joe Valotta in his own handwriting is the same practically as this statement I have just read?
A. The same except there is a little attachment here about the revolver.

Mr. Estep: Exhibit No. 17 I will offer in evidence.

Exhibit No. 17, Jos. Valotta Statement Translated.

[fol. 136] EXHIBIT NO. 17 TO TESTIMONY OF MICHAEL TORTORELLI

I Joe Valotta, I'm making this statement for me are against me.

The night of the 29th Oct., I was having a good time at the home of my Godmother with Music after we had the good time for a while them come Matthew Randazzo and Palermo and said let us go to my God Mother the Musician said it is to- dark, my wife said it was *do*- dark and I said it was to- dark, then those two said let us go then we went the Music began to play a little and after they played a while we went the music got on the car, and then ourselfs went away. Then my brother, and others, went on ahead. Me and Palermo after them when we got to Irwin Ave. I seen 5 persons then these persons, they called us, ginny scab. Shut up I say, mind your own business. Then these say you want to fight I says no and then these say come with me I was afraid believing the strikers, I shot later, I

seen another coming believing to be a companion of the striker I shot him also, it was a Police. I cried then, I throw the revolver in the yard of my God Mother, and later I go home. I tell my Wife and My Brother, that I have killed two persons,, a striker, and a Policeman and they began to cry, then I lay down and sleep about half past nine O'clock my wife saw the Police and I went away, about the Brickyard and slepy one night, and one night I slept at Peppino Veraldi and I came to East Liberty and slept at Perruccio the second day I slept to my cousin Carmel the third I slept at Perruccio and the fourth day I slept at Pitcairn.

When I slept to Piruccio I told him that I had killed two persons, and to Jimmy Febbraro I told the same, then they arranged to take me away and took me in the machine to Pitcairn stopping on our way to Mrs. Moderalli and when arrived at Pitcairn we stop at the house of Medicino Fremk.

My revolver was calibre 38 with Pearl handle, Smith & Wesson nickel plated, bought at the shop where I work from a Policeman his name they cal- him Bill More for $20.00."

Q. This is about the same as the one I read then, except the end of it, where he says "My revolver was calibre 38 with pearl handle, Smith & Wesson, nickel plated, bought at the shop where I work, from a policeman, his name, they call him Bill More, for twenty dollars." That's the only difference?

A. That's the only difference.

Q. Between this statement in his own handwriting and the statement that I have just read?

A. Yes, sir.

(No cross-examination.)

[fol. 137] MRS. ESTELLE COUCH RECALLED

Mrs. ESTELLE COUCH, recalled, testified as follows:

Direct examination.

Mr. Estep:

Q. When you were on the stand before I asked you about the badge that you- husband had worn that night when he left the house?

A. Yes, sir.

Q. I show you police officer's badge No. 862, and ask you if that is your husband's badge and the one that was worn by him the night he was killed?

A. Yes, sir, it is.

Mr. Estep: I offer in evidence police officer's badge No. 862, and call it Exhibit No. 18.

Mr. Ammon: No objection.

(No cross-examination.)

[fol. 138] TESTIMONY OF NOAH WARD

NOAH WARD, a witness called on behalf of Commonwealth, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. Your name is Noah Ward?

A. Yes, sir.

Q. Where do you live?

A. Sewickley.

Q. Where are you employed?

A. I am employed at the Pennsylvania Company.

Q. In what capacity?

A. Watchmann on the Freedmore street gate.

Q. That is on the North Side?

A. Yes, sir.

Q. The Freedmore street gate opens on to what cross street that crosses Freedmore?

A. Well, yes, Marquis street.

Q. And Marquis street really crosses Freedmore at the end of Freedmore where it comes through the gates of the Pennsylvania yards?

A. Right at the end of the power house?

Q. What is the distance from Marquis street down Freedmore to Irwin avenue?

A. Well, it is one hundred and thirty foot lot, and then there is a twenty foot street on Marquis street and then there is a sixty foot street, I think on Brighton Road.

Q. If you start at Marquis street and walk along Freedmore towards Irwin avenue, what is the first street you come to?

A. Brighton Road.

Q. After you pass Brighton Road, what is the next street you come to?

A. There is an alley, but I don't know the name of the alley.

Q. After you pass that alley you come to——

A. Irwin avenue.

Q. That alley would be McCullough street or McCullough alley?

[fol. 139] A. I think that's the name, yes, sir.

Q. So in reality it is at least two squares from your gate to Irwin avenue?

A. Yes, sir.

Q. Were you on duty on the early morning of October 30, 1922?

A. Yes, sir.

Q. Did you know that a shooting had taken place at the corner of Irwin avenue and Freedmore street?

A. I was sitting in the shanty and I heard one shot.

A. What did you do then?

A. I got up and went out to the door and stood by the side of the office, and just as I stopped by the office I heard two shots, tick, tick, and then again they went tick, tick, two more, made four shots; that is five shots all together. I went over and stuck my head around the corner, and a fellow that was there with me says, "Look out, you'll get shot." I says, "What's going on?" He says, "A shooting match up there." Well, I just peeped around and I seen two fellows crossing off of Freedmore.

Q. Wait a minute. When you peeped around in what direction were you looking?

A. I was looking extreme east.

Q. That was right down Freedmore street towards Brighton Road?

A. Yes, sir.

Q. What did you see as you peeped around looking down Freedmore?

A. I saw two men, one came down in the street and the other came down on the sidewalk.

Q. Where were they about when you saw them?

A. Just turning on to Brighton Road going north.

Q. Then you could see these two men from Marquis street to Brighton Road?

A. Very easily.

Q. What was the condition of the atmosphere that night as you looked down Freedmore Street towards Brighton Road?

A. Well, I could see up to Irwin avenue, I could see the windows in that house right at the end of Freedmore street and the door, and I could see the light. I seen them come there and take Couch away.

Q. You saw them carry Couch away and you were then at your shanty?

A. I was standing on the street right there by the shanty. [fol. 140] Q. And you say that you could see down as far as Irwin avenue or the two squares that Freedmore runs?

A. Yes, sir.

Q. Did you notice which way the two men turned that you have reference to that turned on to Brighton Road from Freedmore?

A. They turned no-th. I guess that's north up Brighton Road towards the cemetery.

Q. They were going away from the city on Brighton Road or towards it?

A. Yes, sir; going away from the city.

Q. Do you know who those two men were?

A. I couldn't say.

Q. You don't know any of the men involved in this case?

A. Well, I know pretty near all of them. Good many of them works in our shop down there; that is, have worked in there on and off.

Q. Do you know Valotta here?
A. Yes, Sir.
Q. As working in your shop?
A. Good time, yes, sir. He worked there quite a while.

Cross-examination.

Mr. Ammon:

Q. Valotta worked there about six years before this didn't he?
A. Yes, sir, something like that.
Q. Right along?
A. Yes, sir.
Q. And he worked on after July 1st last when the strike took place?
A. Yes, sir.
Q. And you had a whole lot of trouble around there with strikers after the 1st of July?

Mr. Estep: Objected to as not being cross examination.
Mr. Ammon: I will withdraw the question.

[fol. 141] Mr. Ammon:

Q. Don't you know as a matter of fact that one of these two men ran up Brighton and the other ran up Marquis street?
A. I didn't see him there. I just saw the two coming around off Freedmore on to Brighton Road. I didn't see their faces, I didn't see them——
Q. How long did you stay there then after that?
A. Oh, I stayed there, right there pretty near all night.
Q. Didn't you see one of them break away from the other one and come right past you?
A. No. There didn't nobody come past our shanty.
Q. Didn't Valotta come up right past you and under your nose and go up Marquis street, up to Columbus street?
A. Not that I know of. I didn't see him.
Q. Well, you say the visibility was good, you could see clear down to Irwin avenue?
A. Well, I seen down to Irwin aveune.
Q. As a matter of fact wasn't there a lot of smoke there that night?

A. Well, not so much.

Q. How many engines do you have there puffing out smoke?

A. I couldn't tell you the exact number.

Q. Between one and two hundred engines?

A. But the engines where they are don't affect on there as much as they do on the lower side, down towards Jackson street.

Q. Jackson street is only a small distance away?

A. Well, Jackson street, the wind generally blows towards the east, and it blows the smoke down towards the——

Q. There is a whole lot of smoke there as a general rule?

A. Well, there ain't so much now as there used to be, because they have got a smoke consumer there, they use that to blow the smoke up in the air and throw it up on the hill.

Q. Whole lot of smoke comes out of the engines?

A. They go up through the smoke consumer.

Q. From the engines?

A. Yes, sir. They have a thing that fits right down over the engine, and that smoke——

Q. Do you mean to say that they have a smoke consumer for one to two hundred engines there?

A. They have it clean around the round house, the whole bigness of the round house.

[fol. 142] Q. But there are a lot of tracks running out of the round house constantly, shifting?

A. That smoke goes on the other side towards Jackson street more than it does toward Irwin avenue or Freedmore street.

Q. There was fog that night?

A. Not very much. There wasn't so much there but you could see a man. I could see the colored policeman there on Irwin avenue and know who he was.

Commonwealth rests.

Mr. Ammon opened to the jury.

Testimony of Joe Valotta

Joe Valotta, the defendant, having been duly sworn, testified as follows with the aid of the interpreter:

Direct examination.

Mr. Ammon:

Q. Your name is Joe Valotta?
A. Yes, sir.
Q. How long have you been in this country?
A. About twenty-two years.
Q. Joe, what is your employment?
A. I was working at the railroad shop.
Q. How long have you worked at the railroad shops?
A. Around seven years.
Q. Was that seven years before this trouble you got into?
A. Yes, sir.
Q. Where did you work before that, Joe?
A. I worked for Charlie Howe.
Q. Is that the police magistrate?
A. That man there (indicating).
Q. What did you do for him?
A. Running an express wagon.
Q. What did you do before that?
[fol. 143] A. I worked for the fat-er of that gentleman.
Q. Well, now Joe, is this your wife sitting here?
A. Yes, sir.
Q. And is this congregation of infant units your children?
A. Yes, sir.
Q. Now Joe, where did you get this pearl handled revolver?
A. At the shop.
Q. From whom did you get it?
A. From Bill Moore.
Q. How much did you pay for it?
A. Twenty dollars.
Q. When?
A. During the strike.
Q. Can you tell us about the time?
A. Well, there was awful turmoil one day——

Q. Just a moment. When did you buy it? Give us the date if possible, or the week or the month?

A. I don't remember the month, but it was about one month after the strike began.

Q. And the strike began on July the 1st last?

A. Yes, sir.

Q. Under what circumstances did you happen to buy that revolver?

Mr. Estep: I object to the asking of this question as being immaterial, incompetent and irrelevant.

Objection overruled.

A. Why, one of the strikers, one day, while we were working, and we worked transporting rails, one wanted to jump in and started to call me and another fellow there a sacb, and wanted to jump in the fence, wanted to kill us. Then to protect myself I began to buy the revolver.

Q. What was the condition of things around there, Joe, as to workmen coming and going to and from their work during the strike?

Mr. Estep: I object to that as having connection with the ownership of the revolver, as being incompetent, irrelevant and immaterial. It makes no difference. He had no right to possession or to buy that revolver under those circumstances and to carry it. The law is to protect him; not his revolver.

[fol. 144] Objection overruled.

A. The workingmen were coming from work and coming back from work to their home, always protected by police on horseback; but the strikers would beat them up in an automobile, and would always gain against the police.

Mr. Ammon:

Q. How long did those conditions prevail?

Mr. Estep: Objected to, for the reason that this is only in reference to going to and from work, and does not include Sunday nights, when a man was down at a wake or christening and it is only another way to interject into the trial of a murder case a question as to whether or not

a strike was right or wrong and whether or not this man was a strike breaker or a striker is not the issue.

Mr. Ammon: Along those very lines, I propose to follow this proof up, that before the first killing was had, this man was called a guinea scab by strikers, and that that sentence coming to this man's ears and being understood by him was such an assertion on the part of Hopkins as would lead him to fear that his life was in danger from a strike breaker.

Objection overruled.
(Question read.)

A. You mean of the strike?
Q. Yes.
A. Before this happened, this trouble happened, was four months.
Q. Let's get down to this particular evening. You and Palermo, I believe, had come from this christening?
A. Yes, sir.
Q. Just tell the Court and jury what transpired at the corner when you and Palermo got there?
A. When we reached the place, that street where this bunch was, then we stepped from the sidewalk and went to the street to avoid them. One of them said, "Here pass the scabs." I said to this man, "Mind your own business." And this man all in a rage came toward me, and I said, "You go, don't have trouble." And he was with his fists against me. Then he said that he want to see the end of me, said "I will kill you, and I will show you how to treat the guineas." Well, he was coming toward me, that's all I got the gun——
Q. Wait a minute. When he came to you, what did you do? Did you back up?
A. Yes, I backed up, yes.
[fol. 145] Q. Well, did you get your back against the wall?
A. Yes, sir.
Q. At this time was this man making a demonstration against you with his fists?

Mr. Estep: Objected to as leading.

Mr. Ammon:

Q. What was this man doing at the time?

A. Well, he was all in a rage, he wanted to beat me. I was afraid.

Q. Then what did you do?

A. And I shot at him.

Q. What were you afraid of?

A. Why, just under the impression also that he may be one of the strikers, I was very afraid.

Q. Well, then, what happened next?

A. I started to run. While I was running I heard some footsteps fastening towards me in my back and I got scared and I turned all at once and fired the revolver, emptying all the chambers I had.

Q. Did you know there was a policeman following you?

A. No.

Q. Who did you think it was?

A. I thought it was some of the gang.

Q. What was the condition of your mind when you were running and shot the second time? Had you fear on your mind?

Mr. Estep: Objected to as leading.

The Court: Yes. You are putting the words in his mouth.

Exception noted.

Mr. Ammon:

Q. Why did you fire the second time?

A. Because I was afraid, I thought they would kill me.

Q. Where did you go after that?

A. I ran on Marquis Avenue, Columbus Avenue. I threw the revolve- in the yard of my godmother, and I ran by the bridge.

[fol. 146] Q. That is up at Columbus Street?

A. Yes, sir.

Q. And you lived, I believe, right back of Columbus Street, on Lysle Street?

A. Yes, sir.

Q. When you got home what did you do?

A. Well, when I reached home, I was all under fear, I was shaking, I was trembling, I didn't know what happened to those two. Then in the morning when I got the newspaper, I read that I had killed an American and a policeman.

Q. Is that the first time you knew you had shot a police officer?

A. Yes, sir.

Q. Then what did you do?

A. Well, at that time I had lost my head, when I read that I had killed a police, I didn't know what to do. Then I left the house and w-nt away.

Q. Where did you go?

A. At the brick yard.

Q. How long did you stay at the brick yard?

A. One evening.

Q. Then where did you go?

A. I went to sleep at the house of Fatima Berardi.

Q. How long did you stay there?

A. Until daylight.

Q. Then what did you do?

A. Then walked to East Liberty.

Q. Then what?

A. I went to the house of a cousin of mine with some excuse, and I remained there. I didn't tell anything about the trouble.

Q. How long did you stay there?

A. I don't remember. One day or two.

Q. Then I believe you eventually landed up at Pitcairn?

A. Yes, sir.

Q. And that's the place you were arrested?

A. Yes, sir.

Q. Why did you flee instead of surrendering yourself to the authorities?

A. I was all frightened. I didn't know what to do.

[fol. 147] Cross-examination.

Mr. Estep:

Q. There hadn't been any policemen around that plant, any mounted policemen, for a couple of months before this shooting took place, had there?

A. There were lots of policemen at the shop.

Q. There were no mounted policemen taking the workmen to and from work for two months before this shotting?

A. Every evening they would carry and protect the people to go home.

Q. Isn't it a fact that many of the men had then returned to work? The strike isn't over yet, is it?

A. I don't know.

Q. You don't know whether it is over?

A. I tell you I am right here. I don't know whether it is over.

Q. Don't you still read the newspapers since you have been in jail? Isn't it a fact that many of the men who had gone out on a strike had already returned to work before October 30, 1922, and the strike still on.

A. Well, I don't know. I was not a bookkeeper in the office. I was working in the shop. How could I know who come in an- go out?

Q. You knew that some of the men who had gone out on a strike and had been working with you had returned to work and were working alongside of you again?

A. No, sir, not in the shop where I was, no people would come in there. In my shop suppose three would go out, on the strike, those three would remain out and never come back.

Q. Did you carry the revolver that you purchased every day while you were working?

A. Two days I carried the revolver.

Q. Then during all this time you were not in such danger that you had to carry your revolver to protect you from strikes were you?

A. I carried the revolver when I heard that one evening that in an automobile assaulted some of the workmen and broke the face of this man, and another man, they dug the eyes out of another one, then I got the revolver.

Q. But you only carried it two times while you owned it?

A. I didn't carry the gun there because my house was right in back of the shop. I would run from the shop to the house immediately.

Q. Well, but from the first of August until the 30th of October, you had been out other nights, out on the streets, hadn't you?

[fol. 148] A. No, sir, for four months I didn't go out of the house.

Q. This is the only night you were ever out of the house?

A. Yes, sir.

Q. And you took your gun with you on that night?

A. Yes, sir.

Q. When you came to the corner of Freedmore street and Irwin, what pocket were you carrying the gun in?

A. This (indicating).

Q. Back hip pocket of your trousers? And did you come up Irwin avenue or Armandale street?

A. Irwin avenue.

Q. Where had you come on to Irwin avenue at? What Street?

A. Well, we came on Taylor avenue and then to Irwin and then right up.

Q. How far is Taylor avenue away from Freedmore Street?

A. Two squares.

Q. Then you had been walking along Irwin avenue two squares before you came to the place where the shooting happened?

A. Yes, sir.

Q. Now, you went to the corner of Irwin avenue and Freedmore street in company with Officer Edeburn and Morgan after you were arrested, did you not?

A. Yes, sir.

Q. And you described to them how you had walked and where you were at when you reached the corner of Irwin and Freedmore, where you were at on the sidewalk?

A. Oh, I told something, but how could I remember what place I was on that evening?

Q. I will show you Exhibit 5 and ask you if you see your picture and Palermo's picture on there?

A. Well, if they took the picture, sure I would be there.

Q. I am not asking him that.

A. Yes, sir, I think so.

Q. You think so? Do you remember of having a picture taken over there?

A. Yes, sir.

Q. Now, I will ask you, looking at where you are standing there alongside of Palermo, if that is not the spot you told the officers you were on when you reached and turned the corner of Irwin and Freedmore?

[fol. 149] A. I want to tell the whole truth. I don't want to lie here. I can't describe to you the place exactly where I was at the time of this accident.

Q. Ask him if it is not a fact that he told the officers where

he was standing alongside of Palermo, and if they did not take the photograph to show where they were standing at that time?

A. It was in the night time, and I told the police that maybe this is the place; but who could tell in the night time running under fear, where the place would be?

Q. But at the place shown in that picture, you were not yet under fear, were you?

A. Why wouldn't I be under fear, when people would run after me.

Q. You hadn't yet turned the corner on to Freedmore at that time, and no one had run after you, had they?

A. You mean when I fire the first shot?

Q. No, when you showed the officer where you were at just before you turned the corner.

A. Sure I had turned the corner.

Q. You hadn't turned the corner according to that photograph?

A. They put the picture in here while I was standing there.

Q. Didn't you tell them that was the place you were on the sidewalk just before you turned the corner onto Freedmore street?

A. I am all confused. I don't understand anything what you mean here.

Q. You understood very well when Mr. Ammon was examining you.

A. When the picture was taken, they placed some people at the place where these persons were alleged to be, and then they placed us at other places, there, said, "Is this the place?" and took picture.

Q. Didn't you tell them that that was the place before they took the picture.

A. I said that this is the place in general but not that that was the particular spot.

Q. Well, is that right, that picture now?

A. I am not a learned man to understand the picture. I understand something about my work, but not about the picture.

Q. Does that show a picture of four men standing on the corner?

[fol. 150] Mr. Ammon: I think the picture speaks for itself.

A. Yes, sir.

Mr. Estep:

Q. Do those four men represent the place where the four men were standing on the night of killing, and did you so tell the officer that that is where the four men were standing?

The Court: Where the men were that called him a scab. Is that what you mean?

Mr. Estep: Yes.

The Court:

Q. Is that the spot where those men were standing when he and Palermo came along and where he alleged they called him scabs? Not where he shot, but where they were standing?

A. Now I understand a little better. That is the place.

Mr. Estep:

Q. Now step down and show the jury just where you and Palmero were and the four men?

(Witness complies.)

The Witness: I can't tell where I was.

Mr. Estep:

Q. Where were the four men?

A. At the same place where they are now. There were five persons.

Q. Now when you passed and turned the corner you say you stepped out into the street?

A. Palmero and I were walking head down and talking about the music, and we wanted the same musicians for Christmas at our house. We did not see those who were ahead of us, but as soon as we reached them, when we were about ten or fifteen feet away from them, and seeing them acting in that way, well, we passed on in the middle of the street.

[fol. 151] Q. And then you got back on the sidewalk on Freedmore street about how far from the corner of Freedmore and Irwin?

A. When we were then in the middle——

Q. Ask him to answer my question, when he got back on the sidewalk on Freedmore, and we will get to the other things he wants to tell about later.

(Question read.)

A. About ten feet.

Q. And when you stepped onto the sidewalk from the street where were the men that you had passed on the corner?

A. They were at the same place there, calling names as described; but on- detached himself from the crowd and came toward me.

Q. And he stepped out into the street as he came toward you. Is that right?

A. No, sir.

Q. You were ten feet ahead of them and they were standing on the corner and one man came toward you. Is that right?

A. No, I wasn't standing on the corner.

Q. The men that you had passed were standing on the corner after you had gotten ten feet up Freedmore street and then one of them came towards you?

A. Yes, sir, he came towards me hollering.

Q. Did you stop?

A. I did not stop. I was walking slow.

Q. With your face towards him or your back towards him?

A. I had my back towards him and then I turned my face towards him.

Q. How far away was he when you turned your face towards him.

A. Six or seven feet. I can't tell.

Q. Why did you stop them instead of keeping on up Freedmore street?

A. Well, how would I know if he had something in his hands and threatened me the way he was, he would shoot me or kill me from the back.

Q. You saw his hands, didn't you?

A. What did I know, what he had in his hands?

Q. Could you see his fists?

A. Well I saw his fists, but I couldn't see what he had in his hands, because he was mad and rushing towards me.

[fol. 152] Q. Was he drunk or sober?

A. I can't tell.

Q. How far away was he when you fired the shot?

A. Seven feet about.

Q. And at that time you saw no weapon in his hand?

A. I shot and run. I could not tell.

Q. At the time you shot you saw no weapon in his hand? You can answer that yes or no.

A. But I don't know. How could I say whether he had it or not?

Q. You had all of Freedmore street in front of you with nothing to stop you from running up there and getting away from him without shooting him?

A. I am the father of five children, I have to protect my children. What did I know, if this man would kill me from the back?

(Question read.)

A. I am not good to run.

Q. You did run after you had shot the policeman?

A. I was running slowly.

Q. Why didn't you run slowly before you shot Hopkins?

A. Hopkins would reach me and the other persons in back of him would help him.

Q. After you had shot Hopkins you still had Freedmore street in front of you with nobody to stop you?

A. After I shot Hopkins I heard somebody running after me and I was in danger of life, I turned and shot.

Q. And because somebody was running after you you thought your life was in danger?

A. Yes, sir.

Q. And you fired one shot and you saw the man go down on his knee didn't you?

A. No, sir.

Q. Why did you fire four shots at the one man after he had fallen on his knee?

A. No, sir. Nobody fell on his knee. When I did the shooting, I did the shooting all at once.

Q. And you knew he was a police officer at the time you shot him?

A. No, sir.

Q. He was up under the electric light near McCullough street?

A. It was a little foggy. I couldn't see nothing there.
[fol. 153] And you were only fifteen or twenty feet at the most away from the man when you shot?
A. Yes, sir.
Q. When did you know it was a police officer?
A. When he fell.
Q. Well, why did you say on the direct examination that the first that you knew it was a police officer was when you read it in the paper the next morning?
A. Then I learned that they were dead.
Q. How did you find out that it was a police officer on the night that you did the shooting?
A. When he fell then I noticed that he was a policeman.
Q. You were just as close to him when he fell as you were when you shot, weren't you?
A. No, sir. When I heard that somebody was running after me, it was all at once, I turned and shot; I didn't look and see who he was.
Q. And then when he was down on the ground you saw he was a police officer?
A. No, sir, I didn't see when he was down, but when he was falling; I saw him falling and then I ran away.
Q. How could you tell at that time that it was a police officer?
A. Well, that's the way I saw it.
Q. Well, how did you tell it was a police officer as you saw him falling?
A. Well, I can't say otherwise. That's the way I did see and that's the way I am telling you.
Q. Did you see the buttons on his coat?
A. No. I turned immediately and shot, and then when he fell I noticed the cap.
Q. And you knew it was a police officer's cap?
A. After I shot him, yes.
Q. Then you could see the p-lice officer's cap at least twenty feet from you on that night?
A. Not before; not before the shooting.
Q. But afterwards you saw the cap twenty feet away?
A. With all that fear I had, I didn't measure to see whether it was twenty feet away or what it was.

Adjourned to Wednesday, March 15, 1923.

[fol. 154] And now, Wednesday, March 14, 1923, the hour of 9:30 o'clock A. M. having arrived, court met pursuant to adjournment.

JOSEPH VALOTTA RECALLED

JOSEPH VALOTTA, recalled for further cross-examination.

Examination by Mr. Estep:

Q. Now, what was it that Hopkins said to you when you turned around the corner of Irwin and Freedmore that morning?

A. He said, "Here the guinea scab passes."

Q. Is that all he said?

A. That is all he said at that time. Then he got away from the crowd, and ran after me, and said he wanted to kill me.

Q. You heard all this in the English language, he was talking in English?

A. Yes, sir.

Q. And you understand everything that I say when I am asking you questions today and yesterday?

A. Yes, sir, I understand English.

Q. Why did you need an interpreter?

A. I am a common man, and I understand all about the common talk of work, and everything like that, but I am not good in English.

Q. When you hear the word "kill" you know what that is?

A. Yes, sir.

Q. And when you heard the word "scab," you knew what that was.

A. Yes, sir.

Q. Now, what time did you leave your home on the Monday after the shooting?

A. About 9:00 or 9:30, I am not sure of that.

Q. Why didn't you, on the morning after the shooting, after you had read the newspaper and found you had killed two men, and one of them was a policeman, why didn't you give yourself up to the police officers?

A. I was sleeping on the boards; I had lost my mind after I learned it, and I didn't know what to do.

Q. You knew enough to leave your house when the police officers were outside on that Monday morning, and go down and hide in the brick yard so they couldn't find you?

[fol. 155] A. Yes, sir, I did that, but I was almost out of my mind, and I didn't know what to do.

Q. And you knew enough that the next night you went to Veraldi's house on Brighton Road, and slept there all night?

A. I don't deny that,—I had gone there, yes, sir.

Q. And when Veraldi asked you if you had killed the policeman you told him no you hadn't?

A. I didn't know what to tell, I didn't want to tell it.

Q. Why didn't you—you had killed in self defense, and you were not guilty of anything, so you thought?

A. What could I know what to say?

Q. Couldn't you tell the truth?

A. It was night there, and we didn't have much talk; at that time only a little bit I talked to him.

Q. You went to Nick Pruccio's house, and slept there in the East End of the City of Pittsburgh?

A. Yes, sir.

Q. And all this time you were hiding from the police officers?

A. I didn't understand anything; I didn't abscond, I didn't know where to go.

Q. Then you went to Pitcairn in company with Nick Prussia and Jim Fabria?

A. Yes, sir, I did; I was almost crazy, I didn't know what to do.

Q. You stated at first you were excited, but afterward you thought you would go to Coatesville where your brother-in-law had a farm, and you were going to Coatesville in order to hide from the officers and prevent yourself from being arrested?

A. Well, I said that because a policeman struck me on the face and on the mouth, and threw me down, and I didn't know what else to say.

Q. Even if the p-liceman did strike you, that wouldn't bring to you- mind the name of the Town of Coatesville particularly, would it?

A. I didn't know what to say. There were ten or twelve officers, and some would pull by the feet, and others by the

coat. I wasn't a man any more, and I didn't know what to tell.

Q. You got through telling us yesterday that everything in this statement is true?

A. I had lost my mind—I have lost my mind and don't know what to say.

Q. Have you lost your mind now?

A. Almost. I am thinking of my family, and I haven't got the same mind all of the time.

[fol. 156] Q. Are you thinking of the policeman and the policeman's family, at the same time?

A. I am very sorry for all that I did; I wish I had been dead, and not them.

Q. Why did you throw your gun in Randazzi's yard after you committed the killing?

A. When I passed that place I was acting like crazy I didn't specify the Randazzi place, or this other place—only I threw the gun, and where it went I don't know.

Q. You told the officers you had thrown it in Randazzi's yard?

A. Yes, sir I said in the direction of Randazzi's yard.

Q. You told your brother you had thrown it *is* Randazzi's yard?

A. I don't remember whether I said that to my brother or not.

Q. After you had shot this officer, and found out that he was an officer you had shot on that night, why did you run away?

A. At that moment I didn't know that it was a police officer. And then afterwards I judged it was a police officer by the cap which I saw, and I didn't know what to do.

Q. When you ran away you knew it was a police officer?

A. I wasn't sure; I was acting like crazy—I was crazy.

Q. You didn't know whether he was dead or alive at that time?

A. I didn't know.

Q. You ran away and left him lie there on the ground, without any help or assistance, didn't you?

A. How could I help him when I was all frightened up?

Q. Why didn't you go and report it to somebody, so they could help him?

A. Who had this kind of sentiment at that time?

Q. Your sentiment was he ought to die, and you were glad you killed him, isn't that right?

A. No, sir,—better me—better me die.

[fol. 157] TESTIMONY OF JOHN J. LAMPH

JOHN J. LAMPH sworn.

Examination by Mr. Ammon:

Q. What is your full name?

A. John J. Lamph.

Q. What is your occupation?

A. Stenographer to the Coroner.

Q. Did you personally take the notes of testimony at the Coroner's inquest on the bodies of Thomas Hopkins and Edward C. Couch, at the Coroner's office, in the Morgue Building, on Tuesday November 14, 1922?

A. I did.

Q. Did you transcribe the notes?

A. I did.

Q. Have you your original record there?

A. I have, yes, sir.

Q. Turn to the testimony of Ambrose Musher; have you got the question "Proceed," right down about the sixth or seventh question?

A. Yes, sir.

Q. Now, have you in your notes as follows: "When I got up I saw him stepping away from the first man that was shot, and he was running down Freedmore street, when I saw someone appear from the Alley, and he shot him once, and the man went to his knees. The officer he had come from the Alley. When they were running away they were going from Irwin, and he was coming towards Irwin, and he shot him once, and then he shot him three times and the policeman staggered over to the sidewalk and fell."

A. Yes, sir.

Q. Word for word, is it?

A. Exactly.

Q. Go on further down in the testimony until you come to the question "Did you hear any loud voices before you heard the first shot?" Have you got that question?

A. Yes, sir, I have located it.
Q. —

"Did you hear any loud voices before you heard the first shot?"

"A. They were arguing out there, my wife heard them and told me to get up and see what it was."
is that there?
A. Yes, sir.

[fol. 158] Mr. Estep: I think the proper way would be to have the stenographer read the testimony and not Mr. Ammon.

Mr. Ammon:

Q. Just read the question and the succeeding answer, and the following question and answer:

—. "Q. Did you hear any loud voices before you heard the first shot?"

"A. They were arguing out there, my wife heard them and told me to get up and see what it was."

"Q. She wakened you?"

"A. To get up and see what it was, yes, sir. Just as I was getting out of bed the first man was getting shot."

Q. Now go on down and read the succeeding two questions and answers.
A. —

"—. How far is it from the corner of Freedmore and McCullough streets to where the policeman was when the first shot was fired at him?"

"A. I would say between forty and fifty feet. He was coming towards Irwin and they were running away from Irwin."

"Q. He came out of McCullough street?"

"A. Yes, sir."

"Q. And started towards Irwin avenue?"

"A. Yes,sir, to where th- shooting was."

(No cross-examination.)

TESTIMONY OF GEORGE E. ERHARDT

GEORGE F. ERHARDT sworn.

Examination by Mr. Ammon:

Q. What is your occupation:
A. I am called a laborer.
Q. By whom are you employed?
A. Pennsylvania Railroad Company.
Q. And how long have you worked for the railroad company?
A. Over thirty years.
Q. And what particular depoartment were you working in during the latter part of 1922, last fall?
A. In the store department.
Q. Where is that located?
A. It is the store in the center of the shop.
Q. Where is that shop located?
A. The shop is located between Columbus avenue and the railroad.
[fol. 159] Q. Is that the shop in which Joe Valotta worked?
A. Yes, sir.
Q. Do you know Joe, the defendant here?
A. Yes, sir.
Q. How long have you known Joe?
A. I guess about four or five years or more.
Q. And where did he work?
A. In the machine shop.
Q. Now, I believe the strike was declared July 1st last, wasn't it?
A. Yes, sir.
Q. Do you remember at any time when there was a demonstration against you over there, in which Joe Valotta was present?

Mr. Estep: Objected to, for the reason it is incompetent, irrelevant and immaterial, and secondly, because it is a leading question.

(Question withdrawn.)

Q. Did you ever see a gang of strikers about the place when Joe Valotta was present?

Objected to as leading.

(Question withdrawn.)

Q. Did you ever see anything happen in connection with this strike condition, when you were present and Joe Valotta was present?

A. Yes, sir.

Q. About when was this occurrence?

A. It must have been about July, the latter part of July.

Q. Just briefly state what it was.

A. Joe Valotta and the man with him were bringing up scrap, and I had charge of the scrap platform, and there was six or seven strikers coming there, and they called us scabs, and sons-of-bitches,—that is what they called us.

Q. How long did they keep that up?

A. I couldn't just exactly tell. I was scared and I went into the building, I thought they might throw something at us.

Q. What condition did that render Joe in, did it frighten him?

A. Yes, sir, one man tried to jump over the fence.

[fol. 160] Q. What effect did it have on Joe, that you saw?

A. Joe followed me up on the platform where my work was, and had a load of scrap to take up there.

Q. How long did those troubles continue around the works there, generally, how long?

A. How do you mean?

Q. How long did that trouble continue, with these strikers around there?

A. Probably two months.

Q. What else, if anything, did they say to you at this time when they tried to jump over the fence?

A. I told you; they called us scabs, and called to Joe Valotta to come over the fence.

Q. What did they say to you, if anything, when Joe was present?

A. They spoke to me and to the whole crowd.

Cross-examination.

Mr. Estep:

Q. Where do you live from the works?

A. On Garfield avenue, about five squares up.

Q. Did you go home every day for your sleep?
A. Yes, sir.
Q. And wnet home to your lunch?
A. Not at noon.
Q. You didn't go home at noon?
A. No, sir.
Q. You came in the morning and went home from work in the evening?
A. Yes, sir.
Q. You never had any trouble on your way home, to and from the works, did you?
A. No, sometimes I was scared, but nobody ever attached me.
Q. Nobody ever attacked you?
A. Nobody ever wanted to hit me.
Q. You never carried a gun during that period to and from your work?
A. No, sir.
[fol. 161] Q. They didn't even throw anything, or come over the fence?
A. No, sir.
Q. They made no threats, except to call you names?
A. No, sir.
Q. And you and the rest walked away from the neighborhood?
A. Yes, sir.

Redirect examination.

Mr. Ammon:

Q. Did you see the mounted police around there, taking the men to and from work?
A. Yes, sir.
Q. How long did that keep up?
A. It must be a good time, a good while.
Q. Did you have officers inside the works there, uniform police officers inside the works?

Mr. Estep: Objected to, if there was no trouble.

Q. Weren't you stopped on one occasion going home, and you ple-d with the men because you had been working there thirty years, to let you go?

Objected to as leading.
Objection sustained.
Exception noted.

Recross-examination.

Mr. Estep:

Q. You said on direct examination that this difficulty or trouble down there lasted about two months?

A. Yes, sir.

Q. And about the last of August or first part of September the acute troubles were all over, and it got peaceable?

A. Yes, sir, around where I was working at; the other end I don't know.

Q. There wasn't enough of it to attract your attention, and you walked five squares every day to and from work?

A. When I went to work there was never much bother, only at the fence where my work was.

[fol. 162] Q. After the two months were up, and during the months of September and October, things had quieted down considerably and you weren't bothered with strikers at all, were you?

A. No, sir.

Testimony of E. E. Sarver

E. E. Sarver sworn.

Examination by Mr. Ammon:

Q. Where do you live?
A. 1428 Columbus avenue.
Q. What is your occupation?
A. Machinist.
Q. For whom are you working?
A. Pennsylvania Railroad Company.
Q. How long have you been in their employ?
A. Fourteen years.
Q. Where were you working in July of last year?
A. Allegheny Roundhouse, Pennsylvania Railroad.
Q. Is that on Columbus avenue and Marquis street?
A. Yes, sir.

Q. Do you know Joe Valotta?
A. Yes, sir.
Q. How long do you know of him being on the job there?
A. Probably four or five years.
Q. Will you please tell the court and jury about conditions there after that strike was on on July 1st?

Mr. Estep: Objected to, unless it concerns Joe Valotta.
The Court: The objection is sustained, unless Joe Valotta, the defendant, knew about it, whereby he could be influenced, or his mind might be influenced as alleged by the defense.

Exception noted.

[fol. 163] Q. Do you know about the shop in which Joe Valotta worked?
A. Yes, sir.
Q. What shop or department was that?
A. Machine shop.
Q. Was that affected by the strike?
A. Part-y, not fully.
Q. Was the part that Joe Valotta worked in affected by the strike?
A. There was a few went out of there, not very many.
Q. What were the conditions around there in regard to the men going to and from their work?

Mr. Estep: Objected to, as the witness testified that the machine shop was only partly affected by the strike. There is no way to determine whether that part affected Joe Valotta, or not.

Objection overruled.

A. There was men picketing around there.
Q. How did the men go to and from their work, were they under escort?

Objected to as leading.

Q. Give us the general conditions there.
A. At first they were not taken back and forward from work, but later on some of the men were escorted, I believe, by mounted police; I never seen it.

Q. Tell the court and jury something about this picketing.
A. Well, they walked back and forth.
Q. Whom do you mean by they?
A. The pickets.
Q. Were they strikers, or who were they?
A. Some were strikers. I can't say who they all were, I didn't know them.
Q. Were any of the working men attached?
A. Yes, sir.
Q. Were you one of them?
A. Yes, sir.
Q. What happened to you?

Mr. Estep: Objected to as incompetent, irrelevant and immaterial.
[fol. 164] The Court: Not unless Joe knew about the attach on these men; it is the mental attitude of this man, and the effect it had on him.

Objection sustained.
Exception noted.

Q. Do you know whether Valotta knew about you being attached?
A. I couldn't say.

(No cross-examination.)

TESTIMONY OF GEORGE J. HEINLEIN

GEORGE J. HEINLEIN sworn.

Examination by Mr. Ammon:

Q. What is your occupation?
A. Foreman of the machine shop.
Q. Which one?
A. Allegheny shops.
Q. Pennsylvania Railroad?
A. Yes, sir.
Q. Is that the shop in which Joe Valotta worked?
A. Yes, sir.
Q. Was he under you?
A. Yes, sir.

Q. How long had he been under you?

A. He worked for me in the neighborhood of about five years.

Q. Has he been constantly employed in your shop?

A. Yes, sir, he has been in the employ there about seven years.

Q. And in your shop for how many years?

A. About seven years.

Q. Now, were you foreman there during the labor troubles from July on?

A. Yes, sir.

Q. And did they affect your shop?

[fol. 165] A. Well, the day the strike was called there was three men left the shops, out of about in the neighborhood of thirty-eight.

Q. Did Joe Valotta continue to work with you there day by day?

A. Yes, sir, every day.

Q. Under your supervision?

A. Yes, sir.

Q. Can you tell us about the general conditions around there in regard to this labor trouble?

A. Well, the first two months they were picketing the place.

Q. The strikers?

A. Yes, sir, and some of them were from other shops, I think,—some were picketing that we didn't know.

Q. What was done about protecting the workmen, what was done, if anything?

A. In what way?

Q. Protecting your workmen during their work and going to and from work?

A. Some were beat up, three or four of them, and they were more or less being bothered going to and from work.

Q. Did you have any police protection?

A. Yes, sir, we had police protection, and we had mounted police.

Q. How long did those conditions prevail ther-, actively?

A. Well, they were about there I guess for about three months.

Q. That strike, I understand, is not over yet, is it?

A. According to the strikers it isn't; as far as the Pennsylvania Company is concerned it is over.

Cross-examination.

Mr. Estep:

Q. Where do you live?

A. Mt. Washington.

Q. Did you live in Mt. Washington at the time the strike was called on July 1st, 1922?

A. Yes, sir.

[fol. 166] Q. And you went to and from your work every day, didn't you?

A. Yes, sir.

Q. Were you ever bothered?

A. No, sir.

Q. Did you ever carry a gun during that period of time to protect yourself?

A. No, sir.

Q. And it is a fact, however, that by the first of October at the latest, that all the mounted police had been withdrawn, and the strike had simply worn itself out, isn't that true?

A. Yes, sir.

Q. So at least thirty days before this killing you wouldn't have known, as far as your shops were concerned, that there had ever been a strike?

A. In a way we would have, because every now and again they would spring up a little, and come out and picket for two or three days.

Q. But there hadn't been any picketing for at least a month before that?

A. On and off there was.

Q. And there was no police force after two months, from the 1st of July?

A. I wouldn't say two months; I would venture to say three.

Q. That would be at most up to the 1st of October, that all that had been withdrawn, and you were getting along with your work the same as prior to the strike being called?

A. Yes, sir.

Redirect examination.

Mr. Ammon:

Q. How long did you keep the officers in the works to protect the works?

Objected to.

(Question withdrawn.)

[fol. 167] TESTIMONY OF CHARLES A. GIBSON

CHARLES A. GIBSON sworn.

Examination by Mr. Ammon:

Q. What is your name?
A. Charles A. Gibson.
Q. What is your employment?
A. I work in the Tax Revision office, Allegheny County.
Q. Where do you reside?
A. 2101 Brighton Road.
Q. Do you know the defendant, Joe Valotta?
A. Yes, sir.
Q. How long have you known Joe?
A. I haven't known him long enough to testify for him nor against him. I have only known him personally just shortly before this trouble occurred. I know all of his friends, but Joe moved up there about a year ago, and I was well acquainted with Joe.
Q. Do you know the people with whom he associates in the neighborhood in which he lives?
A. Yes, sir.
Q. Do you know the people who know him?
A. Yes, sir.
Q. And you live in the same community with him?
A. Same neighborhood.
Q. Do you know what his reputation is in the community for peace and good order.
A. I have heard several Americans speak of Joe, and all of the Italians there speak very highly of him.
Q. Do you know his reputation in the community for peace and good order?

A. I would only know that for a short time.
Q. Well, is it good or bad?
A. All that I have heard is very good.

[fol. 168] Cross-examination.

Mr. Estep:

Q. When have you heard these people speaking very highly of him, before or after the killing?
A. After the killing.
Q. Then you didn't know anything about his reputation before this killing?
A. No, sir.

Mr. Estep: I move that all of the testimony of the witness be stricken from the record.
The Court: Motion refused; let the jury take it for whatever it is worth.

TESTIMONY OF CHARLES A. SIMMS

CHARLES A. SIMMS sworn.

Examination by Mr. Ammon:

Q. What is your occupation?
A. Painter.
Q. Where have you been working?
A. For the Pennsylvania Railroad Company.
Q. For how long?
A. Thirty-two years.
Q. Where were you employed last fall, and in the summer?
A. I have been with them thirty-two years.
Q. What particular place did you work?
A. Allegheny shops.
Q. Do you know Joe Valotta?
A. No, sir.
Q. You don't know Joe?
A. I don't know him personally.
Q. Did you see him about the works?
[fol. 169] A. I have seen him, but I don't know him.
Q. What department was he working in?
A. He works in the machine shop.

Q. Were you working there constantly during the summer and fall?

A. Yes. sir,—I was sick, and came back July 1st.

Q. Is that the time the strike started?

A. Yes, sir.

Q. What were the general conditions about there in regard to those troubles?

A. Very bad.

Q. For how long did those conditions keep up?

A. Clear up until October I believe.

Q. Just give us a general description of what was occurring there in regard to those labor troubles?

A. Well——

Mr. Estep: Objected to, because this witness, and the one before, said that these conditions practically ceased by October 1st.

Objected sustained.

Exception noted.

TESTIMONY OF WADE MCCLURE

WADE MCCLURE sworn.

Examination by Mr. Ammon:

Q. What is your occupation?

A. Machinist.

Q. Where do you work?

A. Ft. Wayne Railroad Shops, Columbus avenue.

Q. Where do you live?

A. Glenfield, Pa.

Q. Do you know Joe Valotta?

A. Yes, sir.

Q. For how long have you known Joe?

A. About six years and a half or seven years.

[fol. 170] Q. Do you know the people that know Joe?

A. Yes, sir.

Q. Do you know the people with whom he asociates?

A. Yes, sir.

Q. In the neighborhood in which he lives?

A. Yes, sir.

Q. Do you know what his reputation is for peace and good order?

A. Good.

Cross-examination.

Mr. Estep:

Q. You live in Glenfield?

A. Yes, sir.

Q. How long have you lived in Glenfield?

A. About 38 years.

Q. And that is how many miles below the shops of the Ft. Wayne Railroad?

A. Nine miles.

Q. And you come to work in the morning from Glenfield?

A. Yes, sir.

Q. And you go home at night?

A. Yes, sir.

Q. What did you mean when you say you know the people with whom Joe Valotta associates?

A. Different men in the shops.

Q. You mean then that because he worked there each day and had somebody working alongside of him, that he associated with those men?

A. Yes, sir.

Q. Do you know whether he simply associated with them during his working hours, or whether they were the men he associated with after working hours?

A. During working hours.

Q. And that is necessary association, not based on any knowledge of one's character, is it?

A. No, sir.

Q. You don't know, while working with men, and you doing your duty and they doing theirs during the day, anything about them in particular, their doings at night, or when they are off work?

[fol. 171] A. No, sir.

Q. You don't know anything about him except as a workman?

A. No, but he is very good at that.

Testimony of Mrs. Edna Lasher

Mrs. Edna Lasher sworn.

Examination by Mr. Ammon:

Q. Where do you reside?
A. 908 Lysle street.
Q. How long have you lived there?
A. Five years.
Q. Are you a married lady?
A. Yes, sir.
Q. And you live with your husband and family?
A. Yes, sir.
Q. Do you know Joe Valotta?
A. Yes, sir.
Q. How close do you live to Joe?
A. Two doors above him.
Q. How long has he lived there?
A. Going on three years.
Q. Did you see him almost daily?
A. Yes, sir.
Q. Do you know the people with whom he associates in the neighborhood in which he lives?
A. Yes, sir.
Q. Do you know what his reputation is in the community in which he resides, for peace and good order?
A. Very good, as long as he has been in our vicinity.

[fol. 172] Cross-examination.

Mr. Estep:

Q. Is that an Italian colony or settlement there?
A. Not just exactly.
Q. When you speak about the people he associates with you are speaking about what people?
A. He associated with those Italians, and the American class of people. I conducted a store there.
Q. And he traded at your store?
A. Yes, sir.
Q. Are those the times you would see him, when he would come into your store?
A. Not just exactly. He was there in the evenings—in the summer evenings they would always be out conversing together.

Testimony of William E. Keyser.

William E. Keyser sworn.

Examination by Mr. Ammon:

Q. Your name is William E. Keyser?
A. Yes, sir.
Q. What is your occupation?
A. Driver.
Q. For whom?
A. A. W. McCloy Company.
Q. Where do you reside?
A. 1716 Marquis street.
Q. Do you know Joe Valotta?
A. Yes, sir.
Q. How long have you known Joe?
A. The last four years.
Q. How far away do you live from him?
A. Well now I live about two squares away from him.
Q. Do you know the people with whom he associates in the neighborhood in which he lives?
[fol. 173] A. Not in that neighborhood.
Q. What neighborhood are you talking about?
A. The neighborhood he used to live in.
Q. Where was that?
A. Marquis street.
Q. Do you know the people who know him in that neighborhood?
A. Yes, sir.
Q. Do you know what his reputation has been in that neighborhood for peace and good order?
A. It has been good.

Cross-examination.

Mr. Estep:

Q. What neighborhood is that?
A. 1716 Marquis street.
Q. That is how far away from 912 Lysle street?
A. I judge about two squares.

TESTIMONY OF RALPH F. ZILIAN

RALPH F. ZILIAN sworn.

Examination by Mr. Ammon:

Q. What is your occupation?
A. Machine shop foreman.
Q. Whereabouts?
A. Pennsylvania Railroad at Conway.
Q. How long have you been engaged in that railroad work?
A. Nineteen years.
Q. Do you know Joe Valotta?
A. Yes, sir.
Q. How long have you known him?
A. He has worked seven years up in Allegheny, around seven years.
[fol. 174] Q. Under your direction?
A. Yes, sir.
Q. Do you know the people with whom he associates?
A. Around the shops I did, his friends that he worked with.
Q. Do you know what his reputation around the shops, among the friends with whom he worked, was for peace and good order?
A. Very good, he is a good, hard, steady worker.

Cross-examination.

Mr. Estep:

Q. Where do you live?
A. 1336 Pennsylvania avenue.
Q. How long have you been at Conway?
A. Since October 15th.
Q. You were foreman of the machine shop, you say?
A. Yes, sir, at Allegheny, before I went to Conway.
Q. And Heinlein succeeded you as foreman?
A. Mr. Heinlein was my foreman, I was under him.
Q. And you were taken from there and made foreman at Conway?
A. Yes, sir.

Q. All you know about Valotta is that he was a hard worker, and worked every day in the shop?
A. Yes, sir, Sunday and all.
Q. And you knew his reputation in the shop there?
A. Yes, sir.

[fol. 175] GEORGE J. HEINLEIN RECALLED

Examination by Mr. Ammon:

Q. How long did you say you had known Joe Valotta?
A. About seven years.
Q. And he has been in the shop all of that time?
A. Yes, sir.
Q. Do you know the people with whom he associated every day in the shop when he worked?
A. Yes, sir.
Q. And do you know what his reputation was among the shop workers there and his friends, for peace and good order?
A. Very, very good.

Cross-examination.

Mr. Estep:

Q. Your knowledge of him is limited to the men in the shop?
A. Yes, sir.

TESTIMONY OF HARRY STEIGENWALD

HARRY STEIGENWALD sworn.

Examination by Mr. Ammon:

Q. Where do you reside?
A. 531 East North avenue.
Q. On the North Side?
A. Yes, sir.
Q. What is your occupation?
A. Piece work supervisor.
Q. Where?

A. Allegheny shops.
Q. Do you know Joe Valotta?
[fol. 176] A. Yes, sir.
Q. How long have you known Joe?
A. Close on to six years.
Q. Did you see him every day when he worked?
A. Yes, sir.
Q. Do you know the people around the shops with whom he associated?
A. In the shop I do, yes, sir.
Q. Do you know what his reputation among them is for peace and good order?
A. Good, as far as I know.

Cross-examination.

Mr. Estep:

Q. Did you know Antonio Valotta?
A. If that is the one that worked at the shop, yes, sir.
Q. What is this man's name?
A. Joseph.
Q. Do you know Antonio?
A. Yes, sir.
Q. Do you know Ramaldo Tolotto?
A. No, I don't know the name.
Q. Do you know Joseph Restivo?
A. No, sir.
Q. Do you know Mr. Palermo?
A. No, sir.
Q. Do you know Mr. Rocco?
A. No, sir.
Q. Do you know Mr. Randazzi?
A. No, sir.

[fol. 177] TESTIMONY OF JOHN V. WILSON

JOHN V. WILSON, sworn.

Examination by Mr. Ammon:

Q. What is your profession?
A. Physician.

Q. How long have you been a physician?
A. Since 1913.
Q. Where do you reside?
A. 1332 Juniata street.
Q. North side?
A. Yes, sir.
Q. Do you know Joe Valotta?
A. I do.
Q. The defendant in this case?
A. Yes, sir.
Q. How long have you known Joe?
A. Three years.
Q. Do you know where he lives?
A. Yes, sir.
Q. And do you know the neighborhood and the people around there in which he resides?
A. I know some of them.
Q. Do you know the people that know him in that community?
A. I have met a good many of his friends.
Q. In that vicinity in which he lives?
A. Around his home.
Q. Do you know what his reputation among them has been, in the vicinity in which he lives, for peace and good order?
A. Good, as far as I know.

Cross-examination.

Mr. Estep:

Q. Juniata street is how far from 912 Lysle street?
A. About five squares.
[fol. 178] Q. Are you the family physician?
A. Yes, sir.

Redirect examination.

Mr. Ammon:

Q. You have occasion to go in that neighborhood a great deal I suppose in your practice?
A. Yes, sir.

Testimony of Edward Hough

Edward Hough sworn.

Examination by Mr. Ammon:

Q. What is your occupation?
A. I am in the brick manufacturing business and quarrying stone.
Q. You are a police magistrate in the City of Pittsburgh?
A. I am, that is a side line.
Q. How long have you been a police magistrate?
A. In the neighborhood of two years.
Q. Do you know Joe Valotta?
A. Quite well.
Q. How long have you known Joe?
A. Since about 1904.
Q. Did you ever employ him?
A. At that time he started to work for us.
Q. How long was he in your employ?
A. I judge about ten years he was there.
Q. How often did you see Joe during that ten years?
A. As many days as would be working days.
Q. And have you kept track of Joe since he quit working for you?
A. Yes, sir, I know where he has been employed. He worked for my father and one of my brothers, and then he went to the Ft. Wayne shops.
[fol. 179] Q. Do you know the neighborhood in which Joe resides?
A. Yes, sir, quite well.
Q. Do you know the people that know Joe?
A. Quite a few of them.
Q. Do you know the people with whom he associates?
A. Yes, sir.
Q. Do you know what his reputation is in the community for peace and good order?
A. I never heard of anything but good.

Cross-examination.

Mr. Estep:

Q. Where do you live?
A. I live at 2651 Perrysville avenue.

Q. How far is that from Lysle street, number 912?

A. In the neighborhod of ten squares.

Q. And Valotta has been working at the Ft. Wayne shops about seven years, away from any employment in connection with your work?

A. He has not been in my place for some time.

Q. You haven't kept track of him during that seven years he worked in the Ft. Wayne shops, and lived on Lysle street?

A. Along the line with other men who would work for me, that I would meet in the street, and would meet some of the boys in the street, four or five of them.

Q. You kept no track of his associates, or what he was doing in the evenings, and who his own associates were?

A. You wouldn't think I would, would you?

[fol. 180] TESTIMONY OF FRANK HOUGH

FRANK HOUGH sworn.

Examination by Mr. Ammon:

Q. Your name is Frank Hough?

A. Yes, sir.

Q. You are a brother of the last witness on the stand?

A. Yes, sir.

Q. What is your occupation?

A. I am an engineer.

Q. Where?

A. Carnegie Library.

Q. In Allegheny?

A. Yes, sir, North Side.

Q. Were you ever in the stone business?

A. No, sir.

Q. Do you know Joe Valotta?

A. Yes, sir.

Q. How long have you known Joe?

A. Twenty years.

Q. How often have you seen him during that time, on an average?

A. Well, one time he used to work under me, when he worked for my father. I worked for my father at that

time, and he worked there for my father and of course I was his foreman.

Q. Foreman for how long?

A. About ten years.

Q. Did you see him almost every day?

A. Every day, and in the evenings some. We boys would be around in the evening, and we would see him in the evening.

Q. Do you know the people with whom he associates, friends and neighbors?

A. At that time, yes, sir, I knew them.

Q. And his fellow workmen?

A. Yes, sir.

[fol. 181] Q. Do you know what his reputation is in the community for peace and good order?

Mr. Estep: Objected to, for the reason that the testimony shows it is too remote for the purpose of this case.

Mr. Ammon:

Q. Have you known Joe up to date?

A. Certainly.

Q. Have you seen him pretty often lately?

A. I saw him around on the streets right along.

Q. Do you see the people with whom he associates, and know them?

A. Yes, sir.

Q. And in the community in which he lives, and in the shops in which he works?

A. Yes, sir, I meet fellows that work right in the same shops.

Q. Do you know what his reputation is in the community for peace and good order?

A. Yes, sir.

Q. What is it, good or bad?

A. Good.

Cross-examination.

Mr. Estep:

Q. For the past seven years, since Valotta has been working for the Pennsylvania Railroad in the shops, you haven't kept much in touch with him, have you?

A. Well, I meet him on the street.
Q. Did you know where he lived?
A. Yes, sir.
Q. Have you ever been to his house?
A. I have been to Joe's house.
Q. Where?
A. That is before he lived at this place.
Q. I am asking you about now?
A. Not now, no, sir.
Q. You haven't been down there at his house?
[fol. 182] A. No, sir.
Q. You know where he lived?
A. Yes, sir.
Q. How did you come to know that?
A. By meeting him, and talking to Joe, and him telling me where he lived.
Q. All the information you got was from Joe, by meeting him on the street?
A. And friends of Joe's.
Q. Did you ask them?
A. I don't know that I did.
Q. Have you kept any tab on him at all in the last seven years, since he left your employ, or your father's employ, as to his associates, or what he was doing in the evenings, or the people that knew him down in that community?
A. I never asked him particularly about where he was in the evening.
Q. You didn't know anything about his associates?
A. I met his associates in the evenings.
Q. Where would you meet them?
A. Up in Pleasant Valley, and down along Taggart street there.
Q. How long ago has that been?
A. Just before this thing occur-ed.
Q. Do you know Mr. Randazzi?
A. No sir.
Q. Do you know Mr. Rocco?
A. No sir.
Q. Do you know Mr. Restivo?
A. No, sir.
Q. Do you know Mr. Tollotto?
A. No, sir.
Q. Do you know Mr. Palermo?

A. No, I didn't know them people.
Q. Do you know Mr. Veraldi?
A. No, sir.

[fol. 183] TESTIMONY OF TONY PARRENDO

TONY PARRENDO sworn.

Examination by Mr. Ammon:

Q. Where do you live?
A. 916 Lysle street.
Q. Do you know Joe Valotta?
A. Yes, sir.
Q. Do you live in the same house with him?
A. I lived before in the same house.
Q. When?
A. I lived in the same house before Labor Day.
Q. I believe you were employed at one time by the Houghs?
A. Yes, sir.
Q. How long did you work for them?
A. I worked for them five or six years.
Q. Did Joe work there at that time?
A. Yes, sir.
Q. Where are you working now?
A. Ft. Wayne shops now.
Q. What are you doing there?
A. Machinist's helper.
Q. That is the same job that Joe had?
A. Yes, sir, but I don't work in the same department.
Q. Do you know the people that live around Joe's house, and the men that work with him in the shop?
A. I know the families that live around Joe's house.
Q. And you know the men he worked with in the shop?
A. He worked in the machine shop with George Heinlein.
Q. You know the men in the shop he worked with?
A. Yes, sir.
Q. Do you know the people around Joe's home that know him, his neighbors?
A. Yes, sir.
[fol. 184] Q. Do you know what his reputation is for peace and good order, and for being a good citizen?

A. I know him for the last nineteen years, and he always had a good reputation all the way through.

(No cross-examination.)

TESTIMONY OF SAMUEL HOUGH

SAMUEL HOUGH sworn.

Examination by Mr. Ammon:

Q. What is your business?
A. I manufacture a little in wooden ware.
Q. You are the father of Magistrate Hough?
A. Yes, sir.
Q. Do you know Joe Valotta?
A. Yes, sir, but not in later years so well as when he was a younger man, before he was married; I knew him quite well.
Q. What business were you in then?
A. In the same business, manufacturing.
Q. Did Joe work for you?
A. Yes, sir.
Q. How many years did Joe work for you?
A. I presume it is ten or twelve years.
Q. Since that time you have seen Joe occasionally?
A. I can't say I have, I have not been in so close touch with him as before.
Q. Do you know the people with whom Joe associates, his friends and neighbors?
A. Yes, sir, when we worked for me?
Q. And since that?
A. Not so much as before.
Q. Well, do you know the people with whom Joe associates?
A. Yes, sir, I know some of them.
Q. And do you know what his reputation is in the community for peace and good order?
[fol. 185] A. Well, when he was with us it was particularly good, of course I can tell then better than later, I don't know much about it later.
Q. When he was with you he was particularly good?

A. Yes, sir, he was rather an exceptional young man for truth and veracity, and even-handed justice—he was all right.

Cross-examination.

Mr. Estep:

Q. For seven years at least you have known nothing about him, while he was working for the Pennsylvania Railroad?

A. No, I wasn't so much in touch with him then as I was when he worked for me.

Defendant rests.

[fol. 186] Rebuttal

Testimony of W. J. Kane

W. J. Kane sworn.

Examination by Mr. Estep:

Q. What is your name?

A. William J. Kane.

Q. You are a Police Commissioner of the City of Pittsburgh?

A. Yes, sir.

Q. And in charge of what district?

A. North Side District, Sixth District.

Q. And the headquarters of that is at the old City Hall on the North Side?

A. Yes, sir.

Q. How long have you been in charge over there as Commissioner?

A. Since February of this year.

Q. Of 1923?

A. Yes, sir, and previous to that time I was there.

Q. Were you in charge there in July of 1922?

A. Yes, sir.

Q. August, September and October?

A. Yes, sir.

Q. Was officer Edward Couch one of the officers that was under your jurisdiction?

A. Yes, sir.

Q. Do you recall a strike that was in progress in connection with the Pennsylvania Railroad, and other railroads in the country, that started on the 1st of July, 1922?

A. Yes, sir.

Q. As Commissioner of Police in that district did you delegate police officers to the Pennsylvania Shops on Marquis street?

A. The first period of the strike there were men detailed there.

[fol. 187] Q. Now, from the 1st of July, just tell us about how long it was necessary from that date to detail officers to this particular locality of the Pennsylvania Railroad, at Marquis and Freedmore?

A. During July and August.

Q. And as Commissioner of Police were you in touch with the situation that existed in that neighborhood during July, August, September and October?

A. September and October particularly; July and part of August I was laid up.

Q. You were out on duty in September and October?

A. Yes, sir.

Q. What was the condition in that neighborhood in September and October?

A. Quiet.

Q. Did you have cause for the arrest of anybody?

A. Not during that period.

Q. Were any of your officers ever called for any trouble in that neighborhood, during the period of September and October?

A. No, sir.

(No cross-examination.)

Testimony closed.

[fol. 188] CHARGE TO JURY

Afternoon Session

Points presented on behalf of defendant.

Mr. Ammon addressed the jury.

Mr. Estep addresses the jury.
Oral charge of the Court.
Bowman, reporter.

KLINE, J.:

MEMBERS OF THE JURY: You were examined separately under oath to determine your fitness to sit as jurors in this case, that you had no conscientious scruples against capital punishment, that you had no prejudice against foreigners, that you had no prejudice against Italians in particular, and that you would render a verdict according to the law and the evidence.

The Grand Jury, in its two indictments, charges the defendant with the crime of murder; to which he has pleaded not guilty. As you are the sole jurors of the facts, it now becomes incumbent upon me to explain to you the law which you may apply to the facts as you find them to be, so that you may arrive at a fair and just verdict in this case. The final duty is yours; and when you have discharged it, your responsibilities are at an end.

The defendant at bar is presumed to be innocent; and, therefore, like in all criminal cases, it is incumbent upon the Commonwealth to satisfy you beyond a reasonable doubt as to the guilt of the accused. This need not necessarily in all cases be by direct or positive evidence; but it is sufficient that a chain of facts be proven to exist which establishes beyond a reasonable doubt the existence of the fact in dispute. Likewise, it is incumbent upon the Commonwealth to satisfy you beyond a reasonable doubt of every crime or grade of crime of which the defendant at bar stands charged; and of every grade or degree of crime of which the Commonwealth has not satisfied you beyond a reasonable doubt of the existence of the same, it will be your duty to find the defendant not guilty.

A reasonable doubt under the law is one that is not conjured up in your minds to relieve you of, or to escape the responsibility of a duty. It is said to be such a doubt as would make an ordinary reasonable and prudent man or woman, guided upon those considerations which generally regulate the conduct of human affairs, hesitate, before coming to a conclusion in a matter of importance to him or herself.

If, after a careful examination of the evidence, you are satisfied that the guilt of the accused has been determined in your minds, then you will in the same painstaking way, proceed to determine of what grade or degree of crime he is guilty; and therefore it will require an explanation on my part to aid and assist you in coming to these conclusions.

Where human life is taken, in law it is called homicide. Where it is taken by legal process—an officer in the per- [fol. 189] formance of his duty—it is called justifiable homicide. Where it is taken by accident, in the absence of negligence, it is then termed excusable homicide. But where it is taken without any legal justification or excuse, it is criminal.

[fol. 189] Homicide in Pennsylvania is divided into murder and manslaughter; murder is divided into murder in the first degree and murder in the second degree; manslaughter is divided into voluntary and involuntary manslaughter; thus making four degrees of criminal homicide under our law.

The distinguishing element between manslaughter and murder is that of malice. Malice, members of the jury, is not an ill-will, grudge or spite. It is a legal term and implies much more, and comprehends every case where there has been a wickedness of disposition, hardness of heart, cruelty, a mind bent upon mischief, recklessness of consequences, and an utter disregard of social duty. Malice may be shown by threats, ill-will, grudge or spite, or it may be shown from the nature of the killing. Thus, where an unlawful killing has been proven, malice under the law is presumed; but this may be rebutted by other evidence, which when taken in conjunction with the defendant's legal presumption of innocence, may raise a reasonable doubt in your minds as to the guilt of the accused.

Manslaughter, then, is the taking of the life of another, in the absence of malice. It is voluntary or involuntary. In this case, you will give no consideration to the question of involuntary manslaughter.

Voluntary manslaughter is where a person takes the life of another in the heat of passion due to an adequate cause. Manslaughter often approaches the sacred precincts of murder, and it is necessary to examine very closely at times to see whether or not malice be present. On the other hand,

it very often approaches the case of excusable homicide; for instance, where human life is taken in what we term incomplete self defense.

In order to reduce an intentional killing to manslaughter, there must have been a sufficient cause of provocation, and a state of rage or passion, without time to cool, thereby placing the person beyond the power of his reason, thus impelling him to his deed. If there was no sufficient cause of provocation, if there was no state of rage or passion, if there was time to cool, however short the time may be, such would not be manslaughter, but such would constitute murder under the law.

Murder in Pennsylvania under our statute is defined to be as follows: All murder which shall be perpetrated by means of lying in wait, poison, or any other wilful deliberation and premeditated killing, or which shall be committed in the perpetration of or the attempt to perpetrate, arson, burglarly, robbery or rape, shall be deemed to be murder in the first degree. All other murder shall be deemed to be murder in the second degree. And the jury shall say in their [fol. 190] verdict whether or not it is murder in the first or second degree.

You will notice, members of the jury, from the definition of murder under our statute, those instances which the statute says are murder in the first degree; by poison, lying in wait, in the perpetration of or the attempt to perpetrate arson, burglary, robbery or rape. In all other cases, there must be a wilful, deliberate, premeditated intent to carry the act into effect; but in these cases, the statute, the law itself, says there is a deliberation and a premeditation to carry the act into effect. This will aid and assist you in understanding what is meant in the definition, of wilful, deliberate and premeditated taking of human life.

It does not necessarily follow, members of the jury, that in order to constitute murder in the first degree, the wilfulness, deliberation and premeditation must have existed for the length of time which it ordinarily does in the taking of human life by poison or lying in wait. It is sufficient if they are similar in character. Thus, if the killing is unlawful, it is manslaughter, if it is unlawful and malicious, it is murder in the second degree; if it is unlawful, malicious and with a wilful, deliberate and premeditated intent to take human life, then it is murder in the first degree.

The law does not set any particular time which a person must take to frame the unlawful intent to take human life. Even a moment beforehand would be sufficient, if that be sufficient time to frame the wilful, deliberate and premeditated intent to take human life. So, members of the jury, if there be time to frame in the mind fully and consciously the intent to kill, to select the weapon or the means of death, and to think and know beforehand, although the time may be short, the use to be made of such weapon, there is time to deliberate and to premeditate.

The proof of the intention to kill and the disposition of mind constituting murder, is upon the Commonwealth. It need not be necessarily by direct or express evidence. It may be shown, and very often is shown, by the facts and circumstances of the killing. The presumption of law is that, where a person uses upon the body of another, at some vital part with a manifest design to use the same, a gun, a sword, or pistol, or any other instrument of death, in the absence of qualifying facts, he is presumed to know that such weapon will take life, and, knowing this, he is presumed to have intended the natural and probable consequences of his wrongful act. So, therefore, members of the jury, where a person takes the life of another by the use of a deadly weapon, with a manifest design to use it upon the other, with time to deliberate and to premeditate and without sufficient reason or cause of extenuation, he is guilty of murder in the first degree.

All murder which is not murder in the first degree is necessarily murder in the second degree. Murder in the second degree is where a person takes the life of another in utter disregard of social duty, but where intention to take human life does not exist, nor can it be reasonably inferred from the facts and circumstances. Where an unlawful killing has been proven, the presumption is that it is murder in the second degree and therefore malice be present. It is in-[fol. 191] cumbent upon the Commonwealth to raise it from second to first degree, showing you those elements present which the Court has instructed you in order to constitute murder in the first degree. Likewise, it is incumbent upon the defendant to lower it to voluntary manslaughter.

Members of the jury, the Commonwealth complains that the defendant at bar did on the 30th day of October, 1922, on the North Side of the City of Pittsburgh, inflict upon

the body of Edward C. Couch a dangerous wound from which he died the following day. The first count in this indictment charges the defendant at bar with murder; the second count, with that of voluntary manslaughter. So, under this indictment you may render four verdicts; either murder in the first degree, murder in the second degree, voluntary manslaughter or not guilty.

The Commonwealth of Pennsylvania also complains that the defendant at bar did kill and slay Thomas Hopkins on the 30th day of October, 1922, by inflicting upon him a dangerous wound, from which he died the same day. In this indictment also the first count in the indictment is murder; which would be murder either of the first or second degree. The second count is that of voluntary manslaughter. So under this indictment there are four verdicts which you may render, namely, murder in the first degree, murder in the second degree, voluntary manslaughter and not guilty.

The defense in this case, members of the jury, as you have heard outlined by the defense, is that of self defense. Where self defense is pleaded in a prosecution for homicide it admits the killing and sets up the excuse for the doing of the act as having been done when in deadly terror of loss of life or great bodily harm from which there was no means of escape. It is an affirmative defense; and the burden of proving the same is not placed as heavily on the defendant as it is upon the Commonwealth. As the burden of proving self defense is upon the defendant, it is only necessary to prove such by the fair preponderance of the evidence, and not beyond a reasonable doubt.

The Commonwealth complains that on the 30th day of October, 1922, on the North Side of the City of Pittsburgh, near the corner of Irwin avenue and Freedmore street, then and there the defendant at bar inflicted upon the deceaseds Edward C. Couch and Thomas Hopkins, dangerous wounds, from which they died the same day. The Commonwealth introduced evidence, members of the jury, as to the nature and the character of the wounds, through Doctor Richey, who performed the post mortem examinations at the Allegheny County Morgue.

Doctor Richey testified, in regard to the autopsy of Thomas Hopkins, that he found the body was that of an adult white male, five feet six inches in height, about one

hundred and thirty-five pounds in weight and thirty-five years of age, showing the following mark of recent injury: there was an oval, penetrating would measuring one-half by three-eight-s of an inch on the left anterior chest wall, one and three-quarters inches to the left of the midline, one-[fol. 192] half inch below the clavicle bone at the level of the junction of the rib with the breast bone—of the second rib with the breast bone. Upon dissection, the wound was found to continue backward, slightly downward to the right, splintering the second left rib at the point where it joins the cartilage, perforating the upper lobe of the left lung, tearing a ragged hole one-half inch in diameter in the left lateral wall of the aorta at the beginning of the descending limb, passing through the articulation of the six rib with the fifth and sixth dorsal vertebræ, to end in the muscles of the back, where a lead bullet of about 38 caliber was found. And that from this examination he was of the opinion that death resulted from shock and hemorrhage following a gunshot wound of the chest through the left lung and the aorta.

The doctor also testified that he performed a post mortem examination upon the body of Edward Couch; that he found the body of Edward Couch was that of an adult white male, five feet eleven inches in length, about two hundred pounds in weight, and fifty years of age, showing the following marks of recent injury: There was a small oval, penetrating wound, one-half inch in diameter, in the left lateral abdominal wall, in the anterior axillary line, at the level of the lower margin of the ribs. This wound, upon dissection, was found to continue from left to right, slightly upward and forward, to perforate the coils of the small intestines in four places, the tranverse colon in one place, and the liver, obliquely, in its left lobe, where a stellate hole was found in the anterior and superior surfaces. It was apparent that the bullet had ricocheted, for the would could not be followed further. There was a small, oval, penetrating wound, one-half inch in diameter, in the left anterior abdominal wall, three inches to the left and two inches below the naval. Upon dissection this wound was found to continue backward, downward and to the right, perforating the coils of the small intestines in seven places and the mesentary at two levels, to penetrate the retro-peritoneal pelvic tissues, and to disappear deep in the pelvis

in the back. There was a large quantity of blood in the tissues in the abdominal cavity. After an extensive search, the bullet was not found, having disappeared deep in the pelvis. There was a third small oval, penetrating wound three-eight-s of an inch in diameter at the point of the right shoulder in the back. This wound continued downward, backward and slightly to the right for a distance of six inches, to the end in the posterior axillary fold, where a lead bullet of about 38 caliber was found in the muscles. This bullet had a linear groove, one-half inch in length, on one side, which extended to the base, an oval at groove one-quarter of an inch in length to the right of this, and four straight oblique grooves to the left. There was a fourth oval, penetrating one-half by one-quarter inch at the point of the chin, extending horizontally through the soft tissues for a distance of one inch, to find exit by a similar wound. From his examination he was of opinion that death resulted from shock and hemorrhage following gunshot wounds of the abdomen.

In addition to this, members of the jury, the Commonwealth produced testimony to the effect through the witness Mr. Brady that on October 29, 1922, he in company with Mr. Rodgers and Mr. Hopkins, had been on the North [fol. 193] Side of the city of Pittsburgh on that day, and had been drinking some; that on the very late midnight of October 29, 1922, or the early morning of October 30th, they, in company with a young man by the name of Conoran, were standing at the corner of Freedmore street and Irwin Avenue on the North Side of the City of Pittsburgh, that they had been singing, and that Mr. Brady and Mr. Hopkins, the deceased, had been wrestling; that they were just through with their wrestling bout and standing talking, when the defendant and a friend of his passed; and as they passed, Mr. Hopkins, the deceased, said something to them, and that they proceeded, and that Hopkins walked towards them again and said something to them; whereupon one of these men, which afterwards turned out to be the defendant at bar, Joseph Valotta, said to him to the effect, "What do you want? Are you looking for trouble?" and then that Hopkins proceeded toward the defendant in sort of a menacing manner, with his fists somewhat extended, and that when he proceeded to within approximately seven or eight feet of the defendant, the defendant drew his gun and

fired. After the defendant had shot Hopkins, he then ran up Freedmore street, as you have heard explained in the testimony, and within a few second after the first shot was fired, the officer came down Irwin avenue and learning what was the matter, proceeded to pursue this pair who had gone up Freedmore street. That the officer had proceeded only about a hundred feet, when he heard four more shots. That he saw the policeman, Mr. Couch, go down to his knee, and when Mr. Brady got up to him he said to Mr. Brady, "They got me; go and catch them." That he (witness) then proceeded up Freedmore street, and Mr. Couch got up on his feet and proceeded up Freedmore street for about ninety or more feet—that distance you will remember better than I, perhaps, members of the jury—where he fell. Mr. Brady, after pursuing these men up to Brighton Road where he lost trace of them, came back, and he found the officer lying on the ground, and notified the others; whereupon Mr. Couch was removed to the Presbyterian Hospital, and subsequently to the Allegheny County Morgue; he (witness) then proceeded down to where Hopkins was, who at that time was dead; that the police wagon came and took Hopkins to the Allegheny County Morgue, where the post mortems which we have already referred to in the evidence were made by Doctor Richey.

In addition to this, and practically in corroboration of Mr. Brady, you have the testimony of Mr. Rodgers. He testified practically to the same effect, as Mr. Brady, as to the three of them being there, the joining of Mr. Conoran, and then the appearance on the scene of the defendant and his friend, Mr. Palermo, and as to the shooting. In addition to this, you have the testimony, which practically corroborates that of Mr. Rodgers and Mr. Brady, that of Mr. Conoran. Practically the only distinction between their testimony is the fact that, when the shot was fired, Mr. Conoran did not see the shot fired, as his back was turned to him at that time.

In addition to this the Commonwealth produced testimony through a witness by the name of Mr. Richard Porter. He told you he lived in the Brighton Road, and his attention was attracted by a shot; that he had not been asleep, and that, hearing the shot, he went to the window; and [fol. 194] when he looked out of the window, he saw four flashes and saw Mr. Couch drop to his knees, that he saw the

two men run up the street, could not identify them, and that the officer then arose to his feet and followed them for a short distance and fell.

In addition to this you have the testimony of Mr. Musher, who testified that he lived on Irwin avenue; that he was sleeping at the third story window, and that he had a complete view across Irwin avenue and up Freedmore street. He testified that he was awakened by a shot, and then he said that his wife said there was a noise outside, and that he got up; and just as he did, he saw two men running up Freedmore street; then he heard four more shots, and it appeared to him, he said, at the time, that the officer, instead of coming along Irwin avenue and up Freedmore street, as testified by the previous witnesses, Mr. Brady, Mr. Rodgers and Mr. Conoran, that it appeared to him as though the officer came around McCullough alley, as you have heard explained in the testimony; that he saw the officer fall to his knee after he heard these shots, and that the officer then arose and proceeded in the same way as the men ran.

In addition to this, you have the testimony on behalf of the Commonwealth of Mr. Palermo, the companion of the defendant on the night on which these cases arose. He testified that he and the defendant had been out to a christening that night, and that they stayed there practically until about eleven o'clock, and that Mr. Palermo asked the defendant if he could take the musicians down to another place in some section of Allegheny, and they went; that after they left there, he and Palermo and several others left the house together, but Palermo and his friend separated from the others and came up Irwin avenue to Freedmore street. He said that he noticed a crowd of drunken people on the sidewalk, and that, when they came there, they walked out into the street to get around them; and, as they walked around them, they heard somebody say something to them; and just at that he said he saw the deceased, Hopkins, coming over toward the defendant and himself with his fists outstretched, and said something to defendant, I believe, if I remember his testimony correctly, members of the jury; when this man came over with his hands outstretched toward the defendant and within ten feet of him, the defendant pulled out his gun and shot him.

This is practically the testimony on the part of the Commonwealth, as to the shooting.

Now, what is the story of the defense? The defendant testifies practically the same as Mr. Palermo as to the early part of the evening, that he was with Mr. Palermo and several others at a christening, and that he, with the musicians, left and went down to another house, and they came along Irwin avenue about approximately one o'clock in the morning; that when they reached the corner of Irwin avenue and Freedmore street they left the sidewalk to go out in the street in order to avoid these men who were standing on the sidewalk; and just as they did, that one said, "Here passes a scab"; whereupon the defendant said to him, "You mind your own business. You go away so as there be no trouble," whereupon this man said to him, "I want to see the end of you, I kill a guinea." That he was then around the corner on Freedmore street and that this man then came from the street toward him, while he was standing there with his back toward the wall, and said that he wanted to beat him, and that he wanted to kill him, [fol. 195] and being in fear that he was one of the strikers, he said, he pulled out his gun and shot. After the shooting he ran up Freedmore street and he heard someone behind him, and he was afraid that it was one of the men that was standing at the corner, pursuing him to do injury to him, and in a moment he turned and with his revolver he fired four more shots at the individual, and then he continued to go up Freedmore street. And then he gave a description of the different places to which he went after the shooting. Now, members of the jury, this is the evidence of the defendant as to the shooting. He said, after running up Freedmore street, he threw the revolver in the yard of his godmother, and then he ran to the bridge, and then later on in the early morning he went to his home. The next morning he read in the papers that he had shot a man and a policeman. As to his whereabouts after that, it is useless for me to discuss with you, because it is still fresh in your memory.

In addition to this, the defendant at bar introduced many men who have known him in that community for several years, as to his character as to peace and good order. It is useless for me to discuss who these men were. That is still fresh in your memory. Permit me to say in regard to

evidence of this character, members of the jury, in criminal prosecutions evidence of good character is to be re*ag*rded as evidence of a substantive fact, like any other fact produced in evidence in the case tending to establish the defendant's innocence. And it has been also said by our Supreme Court that it may of itself raise a doubt upon which an acquittal may be based. If his good character, taken in conjunction, with the other evidence, raises a doubt in your minds as to the guilt of the accused, all reasonable doubts are to be resolved in his favor, and — would be your duty to return a verdict of not guilty.

Now, members of the jury, you had an opportunity to see the different witnesses upon the stand, the manner in which they gave their testimony, whether or not they were biased or willing witnesses, the inherent probability or improbability of their stories—these are to be taken by you in determining what weight you will give to their evidence. Remember that the defendant at bar is an interested witness. He is interested in the outcome of this case naturally, and you will then ascertain whether or not that interest in the outcome would affect or color his testimony. Where there is conflicting evidence, it is incumbent upon you to reconcile the same. If you cannot do so, then you try to ascertain which is the most accurate in their description, observation and testimony. Experience has shown us that the testimony of disinterested witnesses furnishes a safer guide to a conclusion than those in interest, for the reason that I have already explained.

Likewise, the credibility of the witnesses is for you. A witness is credible when he is telling the truth, even though he may be mistaken in some particular. Witnesses are not credible when they are not telling the truth or withholding the facts from you which they in good conscience should give to you so that you may arrive at a fair and just verdi-t in this case.

I might say here also, members of the Jury, although the district attorney has quoted quite a good deal of testimony, likewise the attorney for the defense, and also the Court, [fol. 196] it is not their recollection or the Court's recollection that prevails. If there is any doubt in your minds as to the testimony, it is your recollection that will govern you in your deliberations.

At the outset, you are met with the inquiry: Did Edward C. Couch and Thomas Hopkins die of bullet wounds? Although to my mind, members of the jury, the conclusion is inevitable that they did, it is a question for you to determine; and if the Commonwealth has not satisfied you beyond a reasonable doubt that these men both did die of a bullet wound, then you will proceed no further and find the defendant at bar not guilty. But if, upon the other hand, you are satisfied beyond a reasonable doubt that both of these men did come to their death by means of bullet wounds, then you are met by two inquiries; did Joseph Valotta fire the fatal shots that took the lives of Edward C. Couch and Thomas Hopkins; and, if he did, did he do so in self defense?

You remember, members of the jury, previously, in my charge I told you that where self defense is pleaded in a prosecution for homicide it admits the killing but seeks to excuse it as having been done when in deadly terror of loss of life or great bodily harm from which there was no means of escape; also, that it was an affirmative defense and only needed to be proved by the defendant by the fair preponderance of the evidence. Now, what is the evidence you have in this case which may aid and assist you materially in determining the question of self defense?

The defendant testifies that in July and August there was a strike in the Fort Wayne shops of the Pennsylvania Railroad Company; that people came there on different occasions and they were menaced by those who wanted them to join in and sympathize with strikers, that on some occasions they were obliged to be conducted from their work over to their homes under the protection of the police; that on one occasion a man leaned over the fence and theatened him when he and several others were working when the others were out on the strike; that when he came along there on this night he thought that these men were some of the strike sympathizers, and that when he came there and this man came at him with his fists clenched, he then grew nervous and excited and fired the shot. That he then ran up the street, and thinking that another was still pursuing him, and without any hesitation whatever, turned around and fired the fatal shots that killed Edward C. Couch.

As I explained to you, members of the jury, in order to

constitute self defense, the defendant must be in fear of great bodily harm, from which there is no means of escape. Now, a matter that you must take into consideration is, the defendant testified that, when Hopkins came around the corner, he was six or seven feet away from him, coming with clenched fists. Palermo testified that, when Hopkins came towards them after they went around into Freedmore street, the defendant was ten feet away when he shot Hopkins.

Another matter that has been dwelt on quite extensively by the defense and the Commonwealth, is the conditions of the weather that night, whether the defendant was able to see who was pursuing him when he ran up Freedmore street after shooting Hopkins. Mr. Brady said it was a little foggy on that night, but from where he was standing [fol. 197] he could see the officer go down on his knee, and, if I remember correctly, that the officer at that time had passed him and gone up Freedmore street, and was about a hundred feet away. Mr. Rodgers testified it was a little foggy, but he also saw the officer fall and then get up and fall again. Mr. Conoran, the other man who stood at the corner and loked after the body of Thomas Hopkins, testified that he saw the officer fall to his knee, get up and go up the street. Mr. Porter, the young high school student, said he saw the officer one hundred and twenty feet away drop to his knee, and could see brass buttons on his clothes. Mr. Musher, you remember, the witness who lived on Irwin avenue, said he could see out of his third story window clear up to the garage where he saw the officer fall and get up and proceed after the man who had done the shooting.

The defendant himself testified he did not know it was an officer until after he fired the shots. Now, in addition to this, members of the jury, you will remember that the defendant made one statement on the witness stand, that he did not know that it was the officer until after he fired the shots, and then in an admission made by him in writing and which was exhibited to you yesterday, he said that he did not know that it was the officer until the next day, when he read it in the newspaper to his brother, Antonio Valotta; who also made two statements as to the time which his brother came home and whether or not the person shot that night the defendant knew was an officer. It is useless for me to go into detail on that. You remember on

the witness stand he said that his brother came home at six o'clock. In the statement he said four o'clock. On the witness stand he said that his brother said to him that he killed two men and did not know who they were; and in the written statement he said that his brother told him that he killed a man and an officer.

Also as to the condition of the weather, as to the ability for the defendant to see the person who ran after him, in this plea of self defense, you have Mr. Ward, the keeper of the Freedmore gate of the Fort Wayne yards of the Pennsylvania Railroad Company; and he said he could see for two squares.

These are matters which are to be taken into consideration naturally by you in determining whether or not the plea of self defense under the circumstances is justified. Therefore, in conclusion, in regard to this defense, members of the jury, if you believe from all the evidence produced in this case that the circumstances under which the defendant killed Thomas Hopkins and Edward C. Couch were both adequate to raise and sufficient to justify a belief on the part of the defendant that it was necessary to take life in order to save his own, through certain danger, and that he really believed such to exist, and that he shot Thomas Hopkins and Edward C. Couch, believing he was in immediate peril of death or great bodily harm, then it will be your duty to find the defendant at bar not guilty. If, on the other hand, you find that, at the time of the shooting, the defendant was not actuated by malice, but he acted under the influence of the uncontrollable mortal fear raised by threats and conduct of the deceased, and if you think that the circumstances, though adequate to raise the fear, were not sufficient reasonably to justify danger of death or great bodily harm, then you should find the defendant guilty of manslaughter.

[fol. 198] If, on the other hand, members of the jury, you disbelieve the evidence produced by the defendant, that the killing was done in self defense, or that he was not in fear of great bodily harm or imminent peril of death, of course, that does not deprive him of all the other rights or defenses that he has under the law. Because, as I explained to you in my charge, the burden is upon the Commonwealth to satisfy you beyond a reasonable doubt of every grade or degree of crime; and if they have not satisfied you beyond

a reasonable doubt of every grade or degree of crime, it is incumbent upon you to find the defendant not guilty of that crime or grade of crime, or not guilty generally of the crime with which he stands charged.

If, on the other hand, you are satisfied beyond a reasonable doubt that the defendant fired the shots that killed Edward C. Couch and Thomas Hopkins, and the shot that killed Thomas Hopkins was not in self defense, and the shot that killed Edward C. Couch was not in self defense, that he was not in fear of great bodily harm or imminent peril of death, then the defendant at bar is guilty of some crime; and the question for you to determine is what grade of crime that is.

Now, members of the jury, I explained to you that where an unlawful killing has been proven it is murder in the second degree. And therefore it is incumbent upon the Commonwealth to satisfy you beyond a reasonable doubt of those elements which are necessary to make it first degree; to show that there was a wilful, deliberate, premeditated intent on the part of the defendant at bar to take the lives of these two men, for which he stands indicted. On the other hand, the burden is upon the defendant to lower it to voluntary manslaughter. And I explained to you that voluntary manslaughter is the taking of the life of another in the heat of passion; and to reduce it from the crime of murder, there must have been sufficient cause of provocation, state of rage or passion, no time to cook, thereby placing the prisoner beyond the power of his reason and thus impelling him to his deed. But I explained to you, if there was time, however short it may be, to frame the unlawful intent, if he was not in a state of rage or passion, and there was not sufficient cause of provocation, then it would be murder instead of manslaughter. I explained to you that murder in the second degree is where a person takes the life of another through hardness of heart, where there is no intention to take human life, where the intention to take human life does not exist nor can it reasonably be inferred.

(To counsel:) Have counsel for the Commonwealth or the defense any suggestions to the Court as to the matters of evidence or any other matter which should be rightfully brought to the attention of the Court at this time before the jury retires to arrive at a verdict in this case?

Mr. Ammon: At your Honor's kindly suggestion, I would like to call your attention to one matter which your Honor probably innocently omitted: that if the defendant, at the time the res gestæ was occurring, was so obsessed by fear that he did not have his normal faculties of vision or thought, that is an element that might be taken into consideration by the jury.

[fol. 199] The Court: That is a question of law. I think you have that embodied in the points.

Members of the jury, the defendant's counsel has asked me to charge you upon the following points:

"First. To justify killing in self-defense, the prisoner must have reasonably believed that he had no other means of escape from death or from bodily harm." This point is affirmed.

The second point is refused.

"Third. If the deceased appeared to the defendant as an assailant and the defendant had reasonable apprehension of loss of his life or great bodily harm, so imminent at the moment of assault, as to present no alternative of escaping the consequences, but by resistance, though it afterwards appeared that there was no actual danger, killing is justifiable and the verdict must be 'Not Guilty.' "

This point is affirmed.

"Fourth. The presumption against the accused is no higher than that the homicide is murder in the second degree."

This point is affirmed, as I have already explained to you.

"Fifth. The remoteness of threats does not affect their admissibility."

This point is affirmed as a matter of law, but there is no remoteness of threats in the evidence.

Sixth. This point is refused.

Seventh. This point is refused.

"Eighth. Evidence of good character is not mere makeshife but is substantive evidence of a direct character and must be taken into consideration by the jury in connection

with other direct positive evidence; and where the evidence is conflicting and raises an uncertainty in the mind of the jurors, evidence of good character of itself may raise a reasonable doubt as to the guilt, and bring about an acquittal."

This point is affirmed, as I have already explained to the jury.

"Ninth. The defendant is entitled to any and all reasonable doubts arising out of the evidence, and it is incumbent upon the Commonwealth to prove by evidence, the guilt of the prisoner beyond a reasonable doubt."

This point is affirmed, as already explained to the jury.

The tenth point is refused.

(To Counsel:) Nothing else?
Mr. Ammon: No.
The Court: The jury may now retire to arrive at a verdict in this case.

(Jury retired.)

[fol. 200] VERDICT—March 14, 1923

No. 17, February Sessions, 1923.—Guilty of Murder of the First Degree.
No. 19, February Sessions, 1923.—Guilty of Murder of the Second Degree.

Reporter's certificate to foregoing papers omitted in printing.

IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY

JUDGE'S CERTIFICATE TO STATEMENT OF EVIDENCE

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

Charles H. Kline, J.

[fol. 201] IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY

VERDICT

And now, to wit: March, 1923, we the Jurors empanelled in the above entitled case, find the Defendant guilty of murder in the First Degree.

Nicholas Breier, Foreman.

IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY

MOTION FOR NEW TRIAL AND REASONS IN SUPPORT THEREOF

And now, March 16, A. D. 1923, comes the defendant, Joseph Valotta, by Franklin A. Ammon, Esq., his attorney, and moves the Court to grant a new trial in the above entitled case and assigns therefore the following reasons:

1. The verdict was against the law.

2. The verdict was against the clear weight of the evidence.

3. There was no evidence or facts or circumstances in the whole case which would warrant the Jury in finding a verdict of Murder in the First Degree.

4. Under the most favorable aspect of the whole evidence, facts and circumstances in the whole case, the verdict could not rise above voluntary manslaughter.

5. The double homicide being an integral part of the same transaction and the Jury having found the defendant guilty of Murder in the Second Degree in the Hopkins case at No. 19 February Sessions 1923, the verdict in the above case for the death of Officer Couch could rise no higher than Second Degree, the defendant being in jeopardy.

6. The verdict in the above entitled case and the Hopkins case at No. 19 February Sessions 1923, are absolutely inconsistent and should be the same in each case, as the degree of guilt or innocence are equal in each case.

7. The Court erred in refusing defendant's second point, which point and answer is as follows:

"If prisoner believed the deceased had sought him out to kill, retreat is not necessary, if Jury believed deceased manifested an intention to commence attack; under these circumstances, the prisoner may stand and defend himself and even pursue adversary until free from danger. King vs. Commonwealth, 35 P. L. J. 127; 7 Sadler—525.

Refused."

[fol. 202] 8. The Court erred in refusing defendant's sixth point, which point and answer is as follows:

"If the jury believe that the deceased made an attack and demonstration but did not actually strike the prisoner and was in a quarrelsome mood, and the defendant considering himself in some danger, and had resort to a weapon, not to kill but to disable the deceased, his assailant, then the verdict must be 'Not Guilty.'

Refused."

9. The Court erred in refusing defendant's seventh point, which point and answer is as follows:

"If the prisoner was obsessed by fear, either of his life or great bodily harm, after shooting Hopkins, believed by mistake that he was being pursued by members of Hopkins Gang at the corner, and did not actually know it was a Police Officer, and shot with the belief of defending his own life, and the facts warrant such a finding, then the verdict must be 'Not Guilty.'

Refused."

10. The Court erred in refusing defendant's 10th point, which point and answer is as follows:

"Where the matter of excuse or justification of the offence charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and must less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt. Tiffany vs. Commonwealth, 121 Pa., 181.

Refused."

F. A. Ammon, Attorney for Defendant.

In Court of Oyer and Terminer of Allegheny County

Order Granting Leave to File Motion for New Trial

And now, to wit, March 16, 1923, the within motion and reasons for new trial presented in open Court, and allowed filed. Twenty additional days given for further reasons in support of said motion granted to counsel for defendant.

By the Court. R.

[fol. 203] In Court of Oyer and Terminer of Allegheny County

Supplemental Reasons on Motion for New Trial

11. The verdict in the Hopkins indictment at No. 19 February Sessions 1923, being first rendered in open Court by the Jury, finding the defendant guilty of Murder in the Second Degree, and subsequent thereto, the verdict of First Degree, being rendered at No. 17 Feb. Sess. 1923, in the Couch indictment, placed the defendant, Joseph Valotta in double jeopardy of life and limb, contrary to the law in such case made and provided.

12. The double homicides accruing within seconds, and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdict of the Murder in second degree in the Hopkins indictment are inconsistent and contrary to law.

13. The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges.

14. If in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same Jury.

15. The double homicide being the result of one single affray, the rendition of the verdict of second degree in the

Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment.

16. The indictment upon which Joe Valotta was tried in the double homicide were by virtue of the act of Assembly of the Commonwealth of Pennsylvania, Act 31 March, 1860, Sec. 74 P. L. 402; and the arraignment of the defendant, Joseph Valotta, and the preemptory challenges which he as well as the Commonwealth exercised under and by virtue of the act of March 31, 1860, Sec. 36 P. L. 439, in such cases made and provided; and under and by virtue of said acts. The sole jurors qualified to act being of the male sex, it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the Jury trying him for life and liberty.

F. A. Ammon.

[fol. 204] In Court of Oyer and Terminer of Allegheny County

Order Overruling Motion for New Trial

And now, to wit, this 28th day of June, 1923, the defendant and his counsel, being present in open Court, a new trial, is refused.

By the Court.

And now, to wit, this 15th day of September, 1923, and exception noted to the defendant.

Charles H. Kline, Judge. (Seal.)

In Court of Oyer and Terminer of Allegheny County

Opinion on Motion for New Trial

In re Motion ex Parte Defendant for a New Trial

Kline, J.:

Shortly after midnight, on October 30th, 1922, at the corner of Freedmore Street and Irwin Avenue, North Side,

of the City of Pittsburgh, Edward C. Couch, and, Thomas Hopkins, were, shot to their death.

Joseph Valotta, was indicted, and tried for the killing of Edward C. Couch, and Thomas Hopkins.

At the trial, the Commonwealth, contended, the killing was murder, wilful, deliberate and premeditated.

Joseph Valotta, admitted the killing, but, alleged, it was due, to no fault of his, but solely of necessity, to prevent, the taking of his life, or, being put to some serious bodily harm.

Was the killing murder, or, excusable, by way of self defense?

The burden, was on the Commonwealth, to establish the guilt of the accused, beyond a reasonable doubt; and, upon the defendant, alleging self defense, to establish it, by the fair preponderance of the testimony.

The jury, found Joseph Valotta, in the indictment, No. 17 February Sessions, 1923, wherein he was charged, with the crime of the murder of Edward C. Couch, guilty of murder, in the first degree.

The jury, found Joseph Valotta, in the indictment No. 19 February Sessions 1923, wherein he was charged, with the crime of murder, of Thomas Hopkins, guilty of murder in the second degree.

Dr. De Wayne G. Richey, at the request of the Coroner, held an autopsy, on the body of Thomas Hopkins. The result of the autopsy, as told in his testimony, at the trial of the defendant, is as follows:

"Q. Just tell the Court and jury, what you found, as the result of the autopsy, on the body of Thomas Hopkins?

[fol. 205] "A. The body was that of an adult, white, male, five feet, six inches in height, about 135 pounds in weight, and thirty-five years of age, showing the following mark of recent injury.

There was an oval penetrating wound, measuring one-half by three-eighths of an inch on the left anterior chest wall; 1¾ inches to the left of the mid-line one-half inch below the clavicle bone at the level of the junction of the rib with the breast bone—of the second rib of the breast bone. Upon dissection, the wound was found to continued backward, slightly downward, to the right, splintering the second left rib at the point, where it joins the cartilage, per-

forating the upper lobe of the left lung, tearing a ragged hole one-half inch in diameter, in the left lateral wall of the aorta, at the beginning of the descending limb, passing through the articulation of the sixth rib, with the fifth and sixth dorsal vertebra, to end in the muscles of the back, where a lead bullet, of about thirty-eight caliber was found. From this examination, I am of the opinion, that death resulted, from shock and hemorrhage, following a gunshot would of chest, through the left lung and aorta."

Dr. Richey, at the request of the Coroner, held an autopsy, on the body of Edward C. Couch. The result of the autopsy, as told in his testimony, at the trial of the defendant, is as follows:

"Q. Will you just tell the Court and jury what you found as a result of that autopsy?

A. The body of Edward Couch, was that of an adult, white, male, five feet, eleven inches in length, about 200 pounds in weight, and fifty years of age, showing the following marks of recent injury. There was a small oval penetrating wound one-half inch in diameter, in the left lateral abdominal wall, in the anterior axillary line, at the level of the lower margin of the rib.

This wound, upon dissection, was found to continue, from left to right, slightly upward and forward, to perforate the coils of the small intestines in four places, the transverse colon in one place and the liver obliquely, in its left lobe, where a stellate hold was found, on the interior and superior surfaces. It was apparent that the bullet, had ricochet-ed, for the wound could not be followed further.

There was a small oval penetrating wound, one-half inch in diameter, in the left anterior abdominal wall, three inches to the left and two inches below the navel. Upon dissection, this wound, was found to continue backward, downward and the right, penetrating the coils of the small intestines in seven places, and the mesentary at *at* two levels, to penetrate the retroperitoneal pelvic tissues, and to disappear deep in the back. After an extensive search, the bullet was not found, having disappeared, deep in the pelvis.

There was a third small oval penetrating wound, three-eighths of an inch in diameter, at the point of the right

shoulder in the back. This would, continued downwards, upwards and slightly to the right, for a distance of six inches, to end in the posterior axillary vault, where a lead bullet, of about thirty-eight caliber, was found in the muscles. From this examination, I am of the opinion, that [fol. 206] death resulted from shock and hemorrhage, following gunshot wounds, of the abdomen."

On March 16th, 1923, the defendant, by his counsel, filed a motion for a new trial, assigning ten reasons, and, requesting, an extension, of twenty days thereafter, for filing additional reasons.

Additional reasons were filed on April 4th, 1923.

The ten reasons filed on March 16th, 1923, are as follows:

1. The verdict was against the law.

2. The verdict was against the clear weight of the evidence.

3. There was no evidence or facts or circumstances in the whole case which would warrant the jury in finding a verdict of murder in the first degree.

4. Under the most favorable aspect of the whole evidence, facts and circumstances in the whole case, the verdict could not rise above voluntary manslaughter.

5. The double homicide being an integral part of the same transaction and the jury having found the defendant guilty of murder in the second degree in the Hopkins case at No. 19 February Sessions, 1923, the verdict in the above case for the death of officer Couch could rise no higher than second degree, the defendant being in jeopardy.

6. The verdict in the above entitled case and the Hopkins case at No. 19 February Sessions, 1923, are absolutely inconsistent and should be the same in each case, as the degree of guilt or innocense are equal in each case.

7. The Court erred in refusing defendant's second point, which point and answer is as follows:

"If prisoner believed the deceased had sought him out to kill, retreat is not necessary, if jury believe deceased manifested an intention to commence attack; under these circumstances, the prisoner may stand and defend himself

and even pursue adversary until free from danger. King vs. Commonwealth, 35 P. L. J. 127; 7 Sadler 525."

Refused.

8. The Court erred in refusing defendant's sixth point, which point and answer is as follows:

"If the jury believe that the deceased made an attack and demonstration but did not actually strike the prisoner and was in a quarrelsome mood, and the defendant considering himself in some danger, and had resort to a weapon, not to kill, but to disable the deceased, his assailant, then the verdict must be 'Not Guilty.' "

Refused.

9. The Court erred in refusing defendant's seventh point, which point and answer is as follows:

"If the prisoner was obsessed by fear, either of his life [fol. 207] or great bodily harm, after shooting Hopkins, believed by mistake that he was being pursued by members of Hopkins Gang at the corner, and did not actually know it was a police officer, and shot with the belief of defending his own life, and the facts warrant such a finding, then the verdict must be 'Not Guilty.' "

Refused.

10. The Court erred in refusing the defendant's tenth point, which point and answer is as follows:

"Where the matter of excuse or justification of the offense charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and much less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt. Tiffany vs. Commonwealth, 121 Pa. 181."

Refused.

Supplemental Reasons Filed April 4, 1923

11. The verdict in the Hopkins indictment at No. 19 February Sessions 1923, being first rendered in open court by the jury, finding the defendant guilty of murder in the second degree, and subsequent thereto, the verdict of first degree, being rendered at No. 17 February Sessions, 1923, in the Couch indictment, placed the defendant, Joseph Valotta, in double jeopardy of life and limb, contrary to the law in such case made and provided.

12. The double homicides accruing within seconds, and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdict of the murder in second degree in the Hopkins indictment are inconsistent and contrary to law.

13. The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges.

14. If in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury.

15. The double homicide being the result of one single affray, the rendition of the verdict of second degree in the Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment.

16. The indictments upon which Joe Valotta was tried in the double homicide were by virtue of the Act of Assembly of the Commonwealth of Pennsylvania Act 31, March 1860, [fol. 208] Sec. 74, P. L. 402; and the arraignment of the defendant, Joseph Valotta, and the *pre*emptory challenges which he as well as the Commonwealth exercised under and by virtue of the Act of March 31, 1860, Sec. 36, P. L. 439, in such cases made and provided: and under and by virtue of said Acts. The sole jurors qualified to act being of the male sex, it was contrary to law and prejudicial, to the

rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the jury trying him for his life and liberty.

The reasons will be discussed in their order.

1st. The Verdict Was Against the Law

The first reason, is without merit.

Where the first count in an indictment, charges murder, it is obligatory, upon the Court, to instruct the jury, that, should they find, the defendant, guilty, of the crime of murder, they must say in their verdict, whether it is murder, of the first degree, or, murder, of the second degree.

Where the second count, charges voluntary manslaughter, it is the duty of the Court, where there is evidence as to that grade of crime, to instruct them, as to the law, of voluntary manslaughter.

When the elements, of murder, in the first and second degree, and, voluntary manslaughter, are clearly explained, by the Court, and, there is sufficient evidence, upon which, the jury, may predicate a verdict, of either murder, in the first degree, murder, in the second degree, or, voluntary manslaughter, as there was in this case, it becomes then, the duty of the jury, to determine the grade or the degree of guilt, of the accused.

2nd. The Verdict Was Against the Clear Weight of the Evidence

We cannot say, "the verdict," "was against the weight of the evidence" in this case. That, was for the province, of the jury; the credibility of the testimony, was solely for them.

Commonwealth vs. Harris, 237 Pa., 599.
Lindemann vs. Pittsburgh Railways Co., 251 Pa., 492.
Flattery vs. Flattery, 88 Pa., 27.

That, the credible testimony, animated by the presence of living witnesses, was overwhelmingly, against the defense, set up by the defendant, appears, in the verdict, of

the jury. It must be borne in mind, that, the jurors, hear every word, and, have the advantage of seeing, as well as hearing the witnesses. It is by seeing witnesses, and knowing their manner, that one, often gets the truth, rather, than by closing one's eyes, and just listening.

[fol. 209] The third, fourth, and fifth reasons, will be considered together, as they practically, refer to one and the same subject.

It appears, from the evidence, that the deceased, Thomas Hopkins, in company with some of his friends, had been drinking all day, on October 29th, 1922. That in the early morning, of October 30th, 1922, he, in company with Mr. Brady, Mr. Rodgers and Mr. Conoran, were standing, at the corner of Freedmore Street and Irwin Avenue, on the North Side, of the City of Pittsburgh, Pennsylvania. That while standing there, two men passed them, one of whom was the defendant. As the two men passed, something was said to them, whereupon, the deceased, circled out over the street, and walked toward the defendant and his companion, and when he did, the defendant, took out his revolver and shot him. That the defendant, them with his companion ran up Freedmore Street. Officer Couch, upon hearing the shooting, came along Irwin Avenue, to the corner, of Irwin Avenue and Freedmore Street, and gave chase, and while so doing, was shot by the defendant.

From the evidence produced, by the defense, the defendant, prior to this occurrence, had been working, for the Pennsylvania Railroad, near the scene of the trouble.

That while working there, there was a strike, and, that, on one occasion, he and his companions, had been threatened by the strikers. That, on one occasion, he was assisted to his home under guard, but, at the time of the trouble, the strike, was practically at an end, and there had been no serious outbreaks. That the defendant, and a friend of his, by the name of Palermo, had been out, on this evening, to attend a christening, and, that when, they reached the place, where the deceased and his friends were standing, that he and his friend, stepped from the sidewalk, to the street, to avoid them; that one said, "Here pass the scabs," whereupon, the defendant said, to the man, "Mind your own business"; that this man, referring to the deceased, came toward him in a rage, whereupon the defendant said, "You go, don't have trouble," whereupon, the deceased said, "I

will kill you, I will show you how to treat 'Ginnies'." That the deceased was coming toward him, making a demonstration against him, with his fists, and, when the deceased, was within ten or twelve feet of the defendant, he took out his gun and fired. He then started to run, up Freedmore Street, and while running, heard some footsteps in the rear, and fearing, the man, wanted to beat him, and, also, under the impression, that he may be one of the strikers, he got scared, and turned, and, without looking, fired four shots into the body of his pursuer.

In this case, there were two separate and distinct killings. The first ended, with the killing of Thomas Hopkins. The second, occurring, a few moments later, when the defendant, while being pursued, by an officer of the law, and while being thus pursued, in his f-ight, abruptly turned, without knowing, who was following him, immediately pulled his revolver, and fired four shots, into the body of officer Couch.

As to the killing of Hopkins, from the testimony, of the defendant himself, that the deceased, came toward him, making a demonstration, with his fists, and, the defendant and his friend, standing against the building, and making [fol. 210] no attempt, whatever, to escape, from the attack, of an apparently drunken man, and, when the deceased, was within ten or twelve feet, of the defendant, the defendant, pulled out his gun, and fired the fatal shot, which resulted in the death of the deceased, we are of the opinion, that sufficient facts, are present, upon which the jury, were justified, in rendering a verdict as they did, of murder, in the second degree.

As to the killing of Edward C. Couch, the officer, there was sufficient evidence, that, at the point, where the officer was killed, there was an arc light; that the buttons, on his uniform, were discernable, from which, the jury, could draw the conclusion, that he shot the officer, in order, to escape arrest.

In Commonwealth vs. Newson, 277 Pa. 48, it was held:

"Where one is killed by a wound in a vital part, administered by a deadly weapon, no words of provocation, reproach, abuse or slight assault are provocations sufficient, to free the party killing from the guilt of murder."

"6. The verdict in the above entitled case and the Hopkins case at No. 19 February Sessions, 1923, are absolutely inconsistent and should be the same in each case, as the degree of guilt or innocence are equal in each case."

The reason is without merit.

In Commonwealth vs. Brown, 264 Pa. 86, Mrs. Justice Frazer, held:

"Where a defendant is tried, for the killing of two men, under very similar circumstances, the fact, that the jury, returned a verdict of first degree, as to one of the men, and of the second degree, as to the other, is no ground of reversal."

7. The Court erred, in refusing defendant's second point, which point and answer, is as follows:

"If the prisoner believed the deceased had sought him out to kill, retreat is not necessary, if jury believed deceased manifested an intention to commence attack; under these circumstances, the prisoner may stand and defend himself and even pursue adversary until free from danger. King vs. Commonwealth, 35 P. L. J. 127; 7 Sadler, 525. Refused."

This reason is without merit.

In the first place, there was not evidence, that would justify the defendant in believing, that the deceased had sought him out to kill; he had no weapon in his hands, and, further, even if it were true, there is a very essential ingredient, omitted from this point, and that is, that he had no other means of escape.

In Commonwealth vs. Breyessee, 160 Pa. 456, Mr. Justice Williams, said:

"Life may be lawfully taken in self defense; but it must appear, that he who takes it with the inminent danger of [fol. 211] death or great bodily harm, and, that no other way of escape from the danger, was open to him. It is the duty of one who is assailed to flee, if flight is possible, and, it is only, when he is persuaded, that he must suffer death or grievous bodily harm, at the hands of his assailant, or take the life of his assailant, that he may save his own, that he can justify his act as done in self-defense."

To affirm this point, would have been clear error, against the Commonwealth.

8th. The Court erred, in refusing defendant's sixth point, which point and answer is as follows:

"If the jury believe, that the deceased made an attack and demonstration but did not actually strike the prisoner and was in a quarrelsome mood, and the defendant considering himself in some danger, and had resort to a weapon, not to kill but to disable the deceased, his assailant, then the verdict must be 'Not Guilty.' Refused."

This reason is without merit.

The mere fact, that when a person approaches another, apparently in a quarrelsome mood, and, making gestures, without any weapon or instrument of death, it is not sufficient, under the law, to warrant, the use of a weapon, either to kill, or, disable his adversary.

Where the defense is self-defense, as it is in this case, the defendant, would be obliged, to flee, if flight is possible.

Commonwealth vs. Breyessee, 160 Pa. 456, Supra.

9th. The Court erred, in refusing defendant's seventh point, which point and answer is as follows:

"If the prisoner was obsessed by fear, either of his life, or great bodily harm, after shooting Hopkins, believed by mistake, that he was being pursued by members of Hopkins Gang at the corner, and did not actually know it was a Police Officer, and shot with the belief of defending his own life, and the facts warrant such a finding, then the verdict must be 'Not Guilty.' Refused."

The reason is without merit.

To affirm this point, would be giving the jury instructions, contrary to the law.

In Commonwealth vs. Colandro, Mr. Justice Moschizisker said:

"If the circumstances are both adequate to raise and sufficient to justify, a belief in the necessity to take life in order to save one's self from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense; while, if the act is committed under the influence of an uncontrollable fear of death

or great bodily harm, caused by the circumstances, but without presence of all the ingredients necessary, to excuse the act on the ground of self-defense, the killing is manslaughter."

[fol. 212] Therefore, whether or not, the circumstances as presented, were sufficient or not, to excuse, on the ground of self-defense, was a question for the jury, and to instruct, that a killing by mistake, absolved the defendant, from all blame, would be doing an injustice to the Commonwealth.

10th. The Court erred in refusing defendant's 10th point, which point and answer is as follows:

"Where the matter of excuse or justification of the offense charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and much less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt. Tiffany vs. Commonwealth, 121 Pa. 181. Refused."

This reason is without merit.

Counsel for the defendant, bases this point upon the ruling of Mr. Justice Stewart, in the case of Tiffany vs. Commonwealth, 121 Pa. 181, where he said:

"Where the matter of excuse or justification, of an offense charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and much less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt."

It is well settled principle of l-w, where the defendant, relies on some distinct, substantive ground of defense, not necessarily, connected with the transaction, on which the indictment is founded, such as insanity, self-defense or alibi, the burden, is upon him to establish the same, by the preponderance of the evidence, but, where the accused, confines his defense, to the original transaction, charged as criminal, the burden of proof never changes, but remains

on the Commonwealth. In this case, the defendant did not confine his defense, to the original transaction, but offered an affirmative defense, and therefore, the burden is upon him, of proving it, by the fair preponderance of the evidence.

121 Pa., 181.
122 Pa., 299.

11th. The verdict in the Hopkins indictment at No. 19 February Sessions, 1923, being first rendered in open Court by the jury, finding the defendant guilty of murder in the second degree, and subsequently thereto, the verdict of first degree, being rendered at No. 17 February Sessions, 1923, in the Couch indictment, placed the defendant, Joseph Valotta, in double jeopardy, of life and limb, contrary to the law, in such case made and provided.

This reason is without merit.

Article 1, Section 10, of the Constitution of Pennsylvania provides:

"That, a man cannot be twice place in jeopardy of life and limb for the same offense.

[fol. 213] This means, that he cannot be tried again, for the same offense, unless, certain contingencies arise."

Where a person is tried, on two indictments, charging murder, and, to a degree, growing out of one and the same transaction, though separate in time, and no objections made, and the jury, having both indictments before them, for their consideration, it is obligatory, on their part, under proper instructions of the Court, to render their verdict, on both indictments, and, by so doing, the defendant, cannot be said, to be in double jeopardy, of life and limb.

12th. The double homicides occurring within seconds, and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and, the verdict of first degree, in the Couch indictment, and the verdict of murder in second degree, in the Hopkins indictment, are inconsistent and contrary to law.

As this reason has already been considered, in the earlier reasons, we deem it unnecessary to discuss it again.

13th. The defendant, Joseph Valotta, cannot be held responsible, on two indictments, when the same testimony supports both charges.

This reason is without merit.

As this reason has already been discussed in the earlier reasons, we deem it unnecessary to discuss it again.

14th. If, in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins, were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury.

This reason is without merit.

In the case of Withers vs. Commonwealth, 5 S. & R. 59, Mr. Justice Gibson, in discussing, the question of the trial of two indictments for conspiracy, found at different sessions, said:

"The only solid reason for the distinction in regard to felonies, is, that the prisoner having a right to challenge peremptorily, may choose to have a particular juror to try one of the offenses, and yet be altogether averse to him with regard to the other; and thus, if the Court did not interfere, he would, in some measure lose the benefit of his right. In the present case, the prisoner was allowed his challenges on each indictment, and has therefore no ground for complaint. But had it been otherwise, we would view these two charges only, as if they had been included in the same indictment. It would, therefore, seem that the Court, by whom they were tried, were the only judges of the proper exercise, of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error."

[fol. 214] 15th. The double homicide being the result of one single affray, the rendition of the verdict, of second degree, in the Hopkins case, bars the rendition of a verdict in the first degree, in the Couch indictment.

The reason has already been discussed, in the earlier reasons, and, we deem it unnecessary, to discuss it again.

16th. The indictments upon which Jeo Valotta was tried in the double homicide were by virtue of the act of assembly of the Commonwealth of Pennsylvania, Act 31, March, 1860, Sec. 74, P. L. 402; and the arraignment of the defendant, Joseph Valotta, and the *pre*emptory challenges which he as well as the Commonwealth exercised under and by virtue of the Act of March 31st, 1860, Sec. 36, P. L. 439, in such case made and provided; and under and by virtue of said acts. The sole jurors qualified to act being of the male sex, it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the jury trying him for his life and liberty.

This reason is without merit.

In Commonwealth vs. Maxwell, 271 Pa. 378, Mr. Justice Schaffer, said:

"Summing up, we conclude, there was no absolute and fixed qualification of jurors at common law, and from very ancient times their qualifications were fixed by Act of parliament; the qualification of jurors was not the thing spoken of by the section of the Constitution under consideration; the words 'as heretofore' in that section refer to the kinds of cases triable before juries and the *the* trial, not the qualifications of the jurors; the designation 'qualified elector' embraces all electors; the term 'electors' embraces those who may be added to the electorate from time to time."

In the light of the whole record, and of the strong, overwhelming finding of guilt, we see no substantial reason for granting a new trial.

IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

And now, to wit, this 28th day of June, 1923, the defendant and his counsel, being present in open Court, a new trial is refused.

By the Court.

And now, to wit, this 15th day of September, 1923, an exception noted to the defendant.

Charles H. Kline, Judge. (Seal.)

[fol. 215] In Court of Oyer and Terminer of Allegheny County

Opinion on Motion in Arrest of Judgment

Kline, J.:

On March 31st, 1923, the defendant, Joseph Valotta, by Frank A. Ammon, Esq., his Attorney, filed a motion to arrest judgment, assigning the following reasons therefor:

"1. The verdict in the Hopkins indictment at No. 19 February Sessions 1923, being first rendered in open Court by the jury, finding the defendant guilty of murder in the second degree, and subsequent thereto, the verdict of first degree, being rendered at No. 17 Feb. Sessions 1923, in the Couch indictment, placed the defendant Joseph Valotta in double jeopardy of life and limb, contrary to the law in such case made and provided.

2. The double homicides occurring within seconds and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdict of the murder in second degree in the Hopkins indictment are inconsistent and contrary to law.

3. The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges.

4. If in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury.

5. The double homicide being the result of one single affray, the rendition of the verdict of second degree in the

Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment.

6. The indictments upon which Joseph Valotta was tried in the double homicide were by virtue of the Act of Assembly of the Commonwealth of Pennsylvania, Act 31 March 1860, Sec. 74, P. L. 402; and the arraignment of the defendant, Joseph Valotta, and the peremptory challenges which he as well as the Commonwealth exercised under and by virtue of the Act of March 31, 1860, Sec. 36, P. L. 439, in such cases made and provided: and under and by virtue of said Acts. The sole jurors qualified to act being of the male sex it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female ju-ors sit as members of the jury trying him for his life and liberty."

The reasons will be considered in their order.

"1. The verdict in the Hopkins indictment at No. 19 February Sessions 1923, being first rendered in open Court by the jury, finding the defendant guilty of murder in the second degree, and subsequent thereto, the verdict of first degree, being rendered at No. 17 Feb. Sessions 1923, in [fol. 216] the Couch indictment, placed the defendant Joseph Valotta in double jeopardy of life and limb, contrary to the law in such case made and provided."

This reason is without merit.

Article 1, Section 10, of the Constitution of Pennsylvania, provides:

"That, a man cannot be twice placed in jeopardy of life and limb for the same offense.

This means, that he cannot be tried again, for the same offense, unless, certain contingencies arise."

Where a person is tried, on two indictments, charging murder, and, to a degree, growing out of one and the same transaction, though separate in time, and no objection is made and the jury, having both indictments, before them for their consideration, it is obligatory, on their part, under proper instructions of the Court, to render their verdict, on both indictments, and, by so doing, the defendant, cannot be said, to be in double jeopardy of life and limb.

"2. The double homicides occurring within seconds and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdi-t of the murder in second degree in the Hopkins indictment are inconsistent and contrary to law."

This reason, is without merit.

In Commonwealth vs. Brown, 264 Pa., 86, Mr. Justice Frazer, held:

"Where a defendant is tried, for the killing of two men, under very similar circumstances, the fact, that the jury returned a verdict of first degree, as to one of the men, and of second degree, as to the other, is no g-ound for reversal."

"3. The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges."

It appears, from the evidence, that the deceased, Thomas Hopkins, in company with some friends had been drinking all day, on October 29th, 1922. That in the early morning of October 30th, 1922, he, in company with Mr. Brady, Mr. Rodgers, and Mr. Conoran, were standing, at the corner of Freedmore Street and Irwin Avenue, on the North Side, of the City of Pittsburgh, Pennsylvania. That while standing there, two men passed them, one of whom was the defendant. As the two men passed, something was said to them, whereupon, the deceased, circled out over the street, and walked toward the defendant and his companion, and, when he did, the defendant, took out his revolver and shot him. That the defendant, then, with his companion, ran up Freedmore Street. Officer Couch, upon hearing the shooting, came along Irwin Avenue, to the corner of Irwin Avenue and Freedmore Street, and gave chase, and while so doing, was shot by the defendant.

From the evidence produced, by the defense, the defendant, prior to this occurrence, had been working for the [fol. 217] Pennsylvania Railroad, near the scene of the trouble. That while working there, there was a strike, and, that, on one occasion, he, and his companions, had been threatened by the strikers. That on one occasion, he was

assisted to his home under guard, but, at the time of the trouble, the strike, was practically at an end, and there had been no serious outbreaks. That the defendant, and a friend of his, by the name of Palermo, had been out, on this evening, to attend a christening, and, that when, they reached the place, where the deceased and his friends were standing, that he and his friend, stepped from the sidewalk to the street, to avoid them; that one said, "Here pass the scabs", whereupon, the defendant said, to the man, "Mind your own business"; that this man, referring to the deceased, came toward him in a rage, whereupon the defendant said, "You go, don't have trouble", whereupon the deceased said, "I will kill you, I will show you how to treat 'Ginnies.'" That the deceased was coming toward him, making a demonstration against him with his fists, and, when the deceased, was within ten or twelve feet of the defendant, he took out his gun and fired. He then started to run, up Freedmore Street, and, while running, heard some footsteps in the rear, and, fearing, the man, wanted to beat him, and, also under the impression, that he may be one of the strikers, he got scared, and turned, and without looking, fired four shots into the body of his pursuer.

In this case, there were two separate and distinct killings. The first ended, with the killing of Thomas. The second, occurring a few moments later, when the defendant, while being pursued, by an officer of the law, and while being thus pursued, in his flight abruptly turned, without knowing, who was following him, immediately pulled his revolver and fired four shots into the body of Officer Couch.

As to the killing of Hopkins from the testimony of the defendant himself, that the deceased, came toward him, making a demonstration, with his fists, and, the defendant and his friend, standing against the building and making no attempt whatever, to escape, from the attack, of an apparently drunken man, and when the deceased, was within ten or twelve feet, of the defendant, the defendant pulled his gun, and fired the fatal shot, which resulted, in the death of the deceased, we are of the opinion, that sufficient facts, are present upon which the jury, were justified, in rendering a verdict as they did, of murder, in the second degree.

As to the killing of Edward C. Couch, the officer, there was sufficient evidence, that, at the point where the officer

was killed, there was an arc light, that, the buttons on his uniform, were discernable, from which, the jury could draw the conclusion, that he shot the officer, in order, to escape arrest.

In Commonwealth vs. Newson, 277 Pa. 48, it was held:

"Where one is killed by a wound in a vital part, administered by a deadly weapon, no words of provocation, reproach, abuse or slight assault are provocations sufficient to free the party killing from the guilt of murder."

[fol. 218] "4. If in the mind of the Prosecuting Attorney, Joseph Valotta, committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury."

This reason is withou- merit.

In the case of Withers vs. Commonwealth, 5 S. & R., 69, Mr. Justice Gibson, in discussing, the question of the trial of two indictments for conspiracy, found at different sessions, said:

"The only solid reason for the distinction in regard to felonies, is, that the prisoner having a right to challenge peremptorily, may choose to have a particular ju-or to try one of the offenses, and yet be altogether averse to him with regard to the other; and thus, if the Court did not interfere, he would, in some measure, lose the benefit of his right. In the present case, the prisoner was allowed his challenges on each indictment, and has therefore no ground for complaint. But had it been otherwise, we would view these two charges only, as if they had been included in the same indictment. It would, therefore, seem that the Court, by whom they were tried, were the only judges of the proper exercise, of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error."

"5. The double homicide being the result of one single affray, the rendition of the verdict of second degree in the Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment."

In Commonwealth vs. Brown, 264 Pa., 86 Mr. Justice Frazer said:

"Where a defendant is tried, for the killing of two men, under very similar circumstances, the fact, that the jury, returned a verdict of first degree, as to one of the men, and of second degree, as to the other, is no ground for reversal."

"6. The indictments upon which Joe Valotta was tried in the double homicide was by virtue of the Act of Assembly of the Commonwealth, Act 31 March, 1860, Sec. 74, P. L., 402; and the arraignment of the defendant, Joseph Valotta, and the *preemptroy* challenges which he as well as the Commonwealth exercised under and by virtue of the Act of March 31, 1860, Sec. 36, P. L., 439, in such cases made and provided; and under and by virtue of said acts. The sole jurors qualified to act being of the male sex, it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the jury trying him for his life and liberty."

This reason is without merit.

In Commonwealth vs. Maxwell, 271 Pa., 378, Mr. Justice Schaffer said:

[fol. 219] "Summing up, we conclude, there was no absolute and fixed qualification of jurors at common law, and from very ancient times their qualifications were fixed by act of parliament; the qualification of jurors was not the thing spoken of by the section of the Constitution under consideration; the words 'as heretofore' in that section refer to the kinds of cases triable before juries and the trial, not the qualifications of the jurors; the designation 'qualified elector' embraces all electors; the term 'electors' embraces those who may be added to the electorate from time to time."

For the reasons expressed, we are of the opinion, that the motion in arrest of Judgment, should be overruled.

IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

And now, to-wit: This 28th day of June, 1923, the motion in arrest of judgment is overruled.

By the Court.

And now, to wit: This 15th day of September, 1923, an exception noted to the defendant.

Charles H. Kline, Judge. (Seal.)

[fol. 220] IN COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY

MOTION IN ARREST OF JUDGMENT

And now, March 31st, 1923, comes the defendant, Joseph Valotta, by Franklin A. Ammon, Esq., his attorney and moves the Court to arrest judgment in the above entitled case and assigns therefor, the following reasons:

1. The verdict in the Hopkins indictment at No. 19 February Sessions, 1923, being first rendered in open Court by the jury, finding the defendant guilty of Murder in the Second Degree, and subsequent thereto, the verdict of First Degree, being rendered at No. 17 February Sessions, 1923, in the Couch indictment, placed the defendant, Joseph Valotta in double jeopardy of life and limb, contrary to the law in such case made and provided.

2. The double homicides occur-ing within seconds and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdict of the murder in second degree in the Hopkins indictment are inconsistent and contrary to law.

3. The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges.

4. If in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury.

5. The double homicide being the result of one single affray, the rendition of the verdict of second degree in the Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment.

6. The indictments upon which Joe Valotta was tried in the double homicide was by virtue of the Act of Assembly of the Commonwealth of Pennsylvania, Act 31 March, 1860, Sec. 74, P. L., 402; and the arraignment of the defendant, Joseph Valotta, and the *preme*ptory challenges which he as well as the Commonwealth exercised under and by virtue of the act of March 31, 1860, Sec. 36, P. L., 439, in such cases made and provided; and under and by virtue of said acts. The sole jurors qualified to act being of the male sex, it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the jury trying him for his life and liberty.

Franklin A. Ammon, Attorney for Defendant.

[fols. 221 & 222] In Court of Oyer and Terminer of Allegheny County

Sentence

And now, June 28th, 1923, the sentence of the law is that you, Joseph Valotta, be taken hence, by the Sheriff of Allegheny County, to the Jail of that County, from whence you came, and from thence, in due course, to the Western Penitentiary, in Center County, Pennsylvania, and that you there, suffer death, during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on the land owned by the Commonwealth such punishment, being inflicted by either the Warden or Deputy Warden of the Western Penitentiary, or by such person, as the Warden shall designate, by causing to pass through

your body, a current of electricity, of intensity, sufficient to cause death, and the application of such current, to be continued, until you are dead. May God in His infinite goodness, have mercy on your soul.

By the Court. K.

[fol. 223] In Court of Oyer and Terminer of Allegheny County, Pennsylvania

Docket Entries

Court of Oyer and Terminer met Monday March 12th, 1923, at 9:30 o'clock A. M.

List of jurors challenged peremptorily by the Commonwealth, challenged peremptorily by the defense, challenged for cause by the Commonwealth and sustained by the Court, challenged for cause by the Commonwealth and overruled by the Court, challenged for cause by the defense and overruled by the Court, excused by agreement of counsel and consent of the Court, and sworn in the case of

No. 19, February Session, 1923

Commonwealth

vs.

Joseph Valotta

True Bill: First Count, Murder; Second Count, Voluntary Manslaughter

Challenged Peremptorily by the Commonwealth

A. S. Waselief, Geo. F. Horne, W. B. Harvey, Thos. Conroy, Barney Woods, Otis Johnson, Frank Larkin, Mrs. Nellie Riley, Frank M. Potter, Abraham Cohen, John J. O'Rielly, John McClafferty, Matthew Fulmer, J. W. Bowser, A. J. Walker.

Challenged Peremptorily by the Defense

W. L. Sechler, John Mullen, John C. Smith, Terrence Boyle, Casper Stein, Alex. T. Heyl, Robt. J. Brownlee, John

Voekler, M. R. Wilson, John Doris, Frank Ross, A. J. Puffenberg, M. P. Jones, Sr., Harry G. Griffiths, John F. Collins, M. E. Scorer, Wm. J. Kopp.

Challenged for Cause by the Commonwealth and Sustained by the Court

Mrs. Herbert F. Byram, W. Franklin Smiley, Geo. Zeilfelder.

Challenged for Cause by the Commonwealth and Overruled by the Court

A. D. Wadelief, Abraham Cohen, M. E. Scorer.

Challenged for Cause by the Defense and Overruled by the Court

[fol. 224] Terrance Boyle, Harry G. Griffith.

Excused by Agreement of Counsel and Consent of the Court

James E. Bailey.

Sworn

1, Nicholas Brier; 2, James L. Bell; 3, Henry E. Sellers; 4, Mrs. Isabella Griffith; 5, Russell L. Van Cleve; 6, John C. Barrett; 7, Mrs. Wesley Hale; 8, Jos. Bechtol; 9, Sylvester Rooney; 10, W. C. Landis; 11, Albert Marks; 12, A. D. Jones.

Witnesses for Commonwealth

Harry T. Ewing, Dr. We Wayne G. Ritchie, Wm. H. Felix, Dr. H. S. Wallace, Wm. Helmich, Mrs. Estelle Couch, W. F. Detts, Albert Brady, Wm. Rodgers, Clyde S. Edeburn, Wilbert Conoran, Richard Porter, Ambrose Musher, Joseph Palermo, Mary Randazzi, John J. Morgan, Clarence Brown, Dominick Bandazzi, Tony Valotta, Michael Torterelli, Noah Ward.

Witnesses for Defense

Joseph Valotta, John J. Lamph, Geo. F. Erhardt, G. E. Sarver, Geo. J. Heinline, Charles A. Gibson, Charles A.

Simms, Wade McClure, Mrs. Edna Lascher, Wm. E. Geyser, Ralph Zilian, Harry Steigerwald, John V. Wilson, Edward Hough, Frank Hough, Tony Porrento, Samuel Hough, Sr.

Witnesses for Commonwealth Rebuttal

Wm. J. Kane.

[Title omitted]

And now, March 12th, 1923, the Defendant, Joseph Valotta being present in open Court and the Hon. Ambrose B. Reid being specially detailed to hold the February Sessions, A. D. 1923, of said Court and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions A. D. 1923, of said Court and the Hon. Ambrose B. Reid, Hon. Jas. R. McFarlane, Hon. Thos D. Carnahan, [fol. 225] Hon. Chas. H. Kline, and the Hon. Harry H. Rowand, being severally present upon the bench, and the Defendant, Joseph Valotta being still present in open Court and being told to stand up and hold up his right hand and being duly arraigned pleads Non Cul and of this puts himself upon God and his country for trial, District Attorney similiter issue joined. Eo Die a Jury being called and the Defendant, Joseph Valotta being still present in open Court, and by his Counsel exercising his right of challenge there came, Nicholas Brier, James L. Bell, Henry E. Sellers, Mrs. Isabella Griffiths, Russell L. Van Cleve, John C. Barrett, Mrs. Wesley Hale, Joseph Bechtol, Sylvester Rooney, W. C. Landis, Albert Marks, A. D. Jones, twelve good and lawful men and women duly summoned, returned elected by ballot, empanelled and sworn. Eo Die, the Clerk then read the Indictment to the Jury after which he addressed the Jury as follows, upon this indictment he hath been arraigned and thereto hath pleaded Not Guilty and hath put himself upon God and his country, which country you are, for trial, so that your charge is to inquire whether he is Guilty or Not Guilty of the felony wherewith he stands charged. If you find him Guilty, you will say whether he is Guilty of Murder of the First Degree, of Murder of the Second Degree, or of Voluntary Manslaughter, but if you

find him Not Guilty you will say so and no more. Remain together and hear the evidence. Eo Die at 4:00 P. M. o'clock the Defendant Joseph Valotta, being still present in open Court, the Jury retired to their room and Court adjourned to convene Tuesday March 13th, 1923, at 9:30 o'clock A. M. The defendant, Joseph Valotta remanded.

Court of Oyer and Terminer met Tuesday, March 13th, 1923, at 9:30 o'clock A. M.

[fol. 226] [Title omitted]

And now, March 13th, 1923, the defendant, Joseph Valotta, being present in open Court and the Hon. Ambrose B. Reid, being specially detailed to hold the February Sessions A. D. 1923 of said Court and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions A. D. 1923 of said Court and the Hon. Ambrose B. Reid, Hon. Jas. P. Macfarlane, Hon. Thomas D. Carnahan, Hon. Charles H. Kline, and the Hon. Harry H. Rowand, being severally present upon the Bench, trial resumed.

March 13th, 1923, at 4:00 o'clock P. M. the Defendant Joseph Valotta being still present in open Court, the Jury retired to their room and Court adjourned to convene Wednesday, March 14th, 1923 at 9:30 o'clock A. M. The Defendant Joseph Valotta, remanded.

Court of Oyer and Terminer met Tuesday, March 14th, 1923, at 9:30 o'clock A. M.

[Title omitted]

[fol. 227] And now, March 14th, 1923, the Defendant Joseph Valotta, being present in open Court, and the Hon. Ambrose B. Reid, being specially detailed to hold the February Sessions, A. D. 1923 of said Court and all other Judges of the Court of Common Pleas of this County being severally specially detailed to assist in holding the February Sessions, A. D. 1923, of said Court and the Hon. Ambrose B. Reid, Hon. Jas. R. Macfarlane, Hon. Thos. D. Carnahan, Hon. Charles H. Kline, and the Hon. Harry H. Rowand, being severally present upon the Bench, trial resumed,

March 14th, 1923 at 3:50 o'clock P. M. the Defendant Joseph Valotta being still present in open Court, the Jury retired to their room to deliberate upon a verdict Eo Die at 6:00 o'clock P. M. the Defendant, Joseph Valotta, being still present in open Court, the Jury returns with their verdict. The Foreman then arises and pronounces their verdict aloud, that upon their solemn oaths they respectively do say—That they do find the Defendant Joseph Valotta, Guilty of Murder in the Second Degree and so say they all. Eo Die, Whereupon F. A. Ammon, Esq. Attorney for the Defendant, Joseph Valotta, asks the Court for a Poll of the Jury. Whereupon the Court instructs the Clerks to Poll the Jury. Each and every Juror being separately Polled and asked if they had agreed upon a verdict and each answering "I have" and being asked by the Clerk,—"In this issue joined between the Commonwealth and Joseph Valotta, the Prisoner at the Bar how say you? Is he Guilty or Not Guilty of the felony wherewith he stands charged? Each and every Juror answered,—I find the Defendant, Joseph Valotta, Guilty of Murder in the Second Degree. Eo Die, the Defendant, Joseph Valotta remanded. March 16th, 1923, Motion and reasons for New Trial filed. March 31st, 1923, Motion in arrest of Judgment and reasons filed. April 4th, 1923, Supplemental Reasons for new trial filed. [fol. 228] And now, May 28th, 1923, the Defendant, Joseph Valotta, being present in open Court Motion for new Trial and motion in arrest of Judgment argued C. A. V. And now June 28th, 1923, the Defendant Joseph Valotta being present in open Court, Motion for new trial refused and Eo Die Motion in arrest of Judgment overruled. (See Opinion and Order filed.)

[fol. 229] Form 12—Coroner

In Court of Oyer and Terminer of Allegheny County

Inquest

State of Pennsylvania,
Allegheny County, ss:

An inquisition, indented, taken at First Ward, Pittsburgh, in the County of Allegheny, on the 30th Oct. & 14th

day of November, A. D. 1922., before me, W. J. McGregor, M. D., Coroner of the County aforesaid, upon the view of the body of Thomas Hopkins then and there lying dead, upon the oath and solemn affirmations of six good and lawful men of the County aforesaid, who, being sworn and affirmed and charged to inquire, on the part of the Commonwealth, whe-, where and how, and after what manner, the said Thomas Hopkins came to his death, do say, upon their oath and affirmations aforesaid that the said —— ——, born —— —, 1—, age 45 years, — months, — days, nationality American, social relation divorced, occupation truck driver, and residing at 1223 Irwin Ave., N. S. Pittsburgh, Pa., came to his death at the corner of Irwin Ave. and Freedmore St., N. S. Pittsburgh, Pa. on Monday Oct. 30th, 1922, at 1:15 A. M. from Gun Shot Wound in Chest received on day and date above named from Gun in the hands of one Joseph Valotta.

And from the evidence and Post Mortem Examination made the Jury find death was due to the above cause and recommend that the said Joseph Valotta be held to await the action of the Grand Jury upon a charge of Murder.

And so the Jurors aforesaid, upon their oaths and affirmations as aforesaid, say that the aforesaid Thomas Hopkins for the cause aforesaid, in the manner and form aforesaid, came to his death, and not otherwise.

In witness whereof, as well as of the aforesaid Coroner, we, the Ju-ors, have hereunto put our hands and seals, on the day and year and the place above mentioned.

W. J. McGregor, Coroner. (Seal.) 1. J. C. Delphy. (Seal.) 2. Justus Lange. (Seal.) 3. August Fox. (Seal.) 4. R. A. Montgomery. (Seal.) 6. L. W. Miller. (Seal.) 5. R. L. Van Dyke. (Seal.)

[fol. 230] In Court of Oyer and Terminer and General Jail Delivery for the County of Allegheny

Bill of Indictment

Allegheny County, ss:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County

of Allegheny, upon their oaths and solemn affirmations, respectively, do present that Joseph Valotta, late of the County aforesaid, yeoman, on the thirtieth day of October, in the year of our Lord one thousand nine hundred and twenty-two, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, in and upon the body of one Thomas Hopkins, in the peace of God and this Commonwealth then and there being, feloniously, willfully and of his malice aforethought did make an assault, and him, the said Thomas Hopkins then and there feloniously, willfully and of his malice aforethought did kill and murder, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do further present that the said Joseph Valotta, on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, in and upon the body of the said Thomas Hopkins, in the peace of God and of this Commonwealth then and there being, feloniously did make and ass-ult, and him, the said Thomas Hopkins, then and there feloniously did kill and slay, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Samuel H. Gardner, District Attorney for Allegheny County.

Test pro. Respub.: W. J. McGregor, Clyde Edeburn, J. J. Morgan, Robt. H. Braun, Frank Crowley, Clarence Brown, Wm. J. Kane, F. Dodson, John J. McInerney, J. Schnuer, Ambrose Musher, John Beck, John Skillcorn, John Platt, Andy Caserri, Joe Palerino, B. Keller, Lee McBride, Bert Reed.

Sworn by me.

A. H. Wolfe, Foreman.

[Endorsed:] True bill. A. H. Wolfe, Foreman. March 12th, 1923. The Defendant Joseph Valotta being present in open court and being told to stand up and hold up his right hand and being duly arraigned pleads non cul. and

of this put himself upon God and his country for trial. Dist. Att'y similiter issue joined. Jerry L. Deasy, R. Patton, John Hickey, Dom Randazzi, Mrs. Mary Newman, M. Tarterella, Phil Marmo, Sam De Couko, Mrs. Mary Randazzi, R. Porter, Thomas Crogan, Louis H. Leff, M. Feeney, H. Ewing, Mrs. —— Couch, J. J. Morgan, Tony Valotta, F. Boyd, Albert Brady, Wm. Rodgers, Will Cornoran. Guilty—See Verdict filed of Murder in the Second Degree.

[fol. 231] In Court of Oyer and Terminer and General Jail Delivery of Allegheny County

[Title omitted]

Verdict—Filed March 14, 1923

And now, to-wit March — 1923, we, the Jurors empanelled in the above entitled case, find the Defendant Guilty of Murder in the Second Degree.

Nicholas Brier, Foreman.

[File endorsement omitted.]

[fols. 232 & 233] Clerk's certificate to foregoing papers omitted in printing.

[fol. 234] In Supreme Court of Pennsylvania

Opinion—January 7, 1924

"279 Pa., 84

From his sentence to death following a verdict of guilty of murder of the first degree, defendant brings this appeal.

As a result of the testimony they heard, the jury could have found these facts and circumstances: Defendant was employed where there had been a strike in progress for some time antedating the night of the killings. He had been at a social gathering and with a companion was proceeding along a public street shortly after 1 o'clock in

the morning, when he came upon a group of intoxicated men, one of whom was Thomas Hopkins. As appellant passed them, ugly remarks were exchanged between him and Hopkins. The latter referred to defendant as a 'scab,' offered to fight him, and in manifestation of his purpose approached defendant with clenched fists; as he did so, defendant stood with his back to the wall of a building making no effort to escape. Defendant was armed, Hopkins was not. When there was a distance of about ten feet between them appellant fired one shot at Hopkins, killing him instantly. This shot was heard by Edward C. Couch, a police officer who was patrolling his beat but a short distance from the scene of the shooting. He immediately started in that direction, and, as he approached, defendant and his companion ran away, pursued by the police officer, who gained on them; when he had caught up within twenty feet of them, defendant turned, fired a shot, which brought the police officer to his knees, and then fired three [fol. 235] other shots, all of which took effect in the policeman's body. The defendant continued running away, threw his revolver into the yard of an acquaintance, where it was subsequently found, hid from the police officers for two or three days, was apprehended, admitted the killing, set up that he was afraid of Hopkins, because of the terror which had been created by the strike (but which other testimony in the case indicated had largely abated) and said that he did not know Couch was a police officer until after he had shot him, when he saw he had on a policeman's cap, but supposed, as he was being pursued by Couch, that the latter was a striker or a strike sympathizer bent upon killing him or doing him serious bodily harm, and, actuated by these fears, he shot him.

Two indictments were found which were tried together, one for the killing of Hopkins and the other for the killing of Couch; on the first, the verdict was guilty of second degree murder, on the second, guilty of first degree murder. We are not concerned with the Hopkins killing; this appeal is from the sentence to death for the killing of Couch.

The main argument before us on the facts is that defendant did not know Couch was a police officer, that because of darkness, fog and smoke, he did not recognize him as such, until he had shot him, although he was in full

uniform. There was ample evidence from which the jury could have concluded otherwise, that it was sufficiently light to see he was an officer, that the shooting took place in the near vicinity of a street light and that, as others saw his uniform, the defendant must have seen it. The Commonwealth calls attention to the fact that, after firing the first shot, defendant fired three others with accurate aim when deceased was but a few feet away, so close that there were powder marks on his face, and urges that under the circumstances as disclosed by the evidence and the light conditions, the defendant must have known his pursuer was a police officer. Passing the question whether it would have made any dif- [fol. 236] ference in the grade of defendant's crime, that he did not recognize his pursuer as a police officer, that question was for the jury, to whom it was fairly submitted.

Appellant's first contention is that the evidence is not sufficient to convict of a higher crime than voluntary manslaughter. With this we cannot agree. There was ample evidence, as heretofore outlined, to warrant a first degree conviction.

The second argument advanced by appellant's counsel is that there was inadequate and erroneous instructions by the trial judge on the law of self defense. Our examination shows that the court instructed the jury fully on the law of self-defense, saying to them that defense had to be made out only by the preponderance of the evidence. This is in accordance with the law as we have announced it: Com. v. Palmer, 222 Pa. 299; Com. v. Rossogulo, 263 Pa. 93; Com. v. Weinberg, 276 Pa. 255. The third reason assigned for invalidating the verdict is that the defendant was placed in double jeopardy. How it could be contended that there is double jeopardy to a defendant in trying him for the killing of two different individuals, it is a little difficult to comprehend. Twice in jeopardy is available to a defendant as a bar only where he has been twice put in jeopardy of life or limb for the same offense: Article I, Section 10, Pennsylvania Constitution of 1874; McCreary v. Com., 29 Pa. 323; Hilands v. Com., 111 Pa. 1; Com. v. Fitzpatrick, 121 Pa. 109. Where two persons are killed 'by separate shots or strokes, although in the same riot or affray, an acquittal or a conviction of one * * * homicide is no bar to an indictment for the other, as they

are distinct acts'; 16 C. J. 283. See also 2 Wharton's Criminal Procedure, 10th Ed., Section 1399, et seq.

[fol. 237] The fourth alleged error in the trial is that the court permitted women to act as jurors, appellant contending that, as the act which defines murder in the first degree was passed in 1860, when women were not eligible as jurors, they were not qualified triers of that offense when this case came on to be heard in 1923. It is sufficient to say that we determined, in Com. v. Maxwell, 271 Pa. 378, where the defendant was charged with murder, that women are qualified to sit as jurors in such cases.

The fifth attack made on the integrity of the verdict is that it was improper to try the defendant upon the two indictments at the same time. The record shows that he made no objection to be thus tried. Assuming, but not deciding, that notwithstanding his failure to object on trial, he can now be heard to raise this question, the simultaneous trial on two indictments charging murder is warranted and the finding of guilt in the second degree on one indictment does not affect the first degree conviction on the other: Com. v. Brown, 264 Pa. 85.

The sixth contention of defendant, that the verdicts were of unequal degree, although founded on identical evidence, has been met and answered by what has heretofore been said.

All of the assignments of error have been carefully examined and considered, as has the entire record of the case as required by the Act of February 15, 1870, Section 2, P. L. 15. We discover no error on the trial. The record shows there are present in it the ingredients necessary to a conviction of murder of the first degree, and our minds are satisfied that defendant's conviction was warranted by the proofs.

The assignments of error are overruled, the judgment is affirmed and the record is remitted to the court below for the purpose of execution."

[fols. 238-266] Petition for reargument, covering 30 pages, omitted from this print. It was denied and nothing more by order October 6, 1924.

[fol. 267] [File endorsement omitted.]

[fol. 268] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed November 28, 1924

To the Honorable the Judges of said Court:

Stanley P. Ashe, defendant in the within Writ mentioned for the return thereto, respectfully submits to your Honors that true it is that the said Joseph Valotta therein mentioned is confined and restrained of his liberty by him, the said Stanley P. Ashe, and the said defendant alleges that the said Joseph Valotta is so restrained lawfully by virtue of a commitment issued out and by virtue of the President Judge of the Court of Oyer and Terminer and General Jail Delivery of the County of Allegheny, in the State of Pennsylvania, under and by virtue of a sentence to death by electrocution duly imposed according to law upon the said Joseph Valotta; the said commitment and sentence being as follows:

"Wherefore, June 28th, 1923, the sentence of the law is that you, Joseph Valotta, be taken hence by the Sheriff of Allegheny County to the Jail of that County from whence you came and from thence in due course to the Western Penitentiary in Center County, Pennsylvania, and that you suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose, on land owned by the Commonwealth. Said punishment being inflicted either by the Warden or Deputy Warden of the Western Penitentiary or by such person as the Warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and the application of such current to be continued until you are dead. May God in His infinite goodness have mercy on your soul."

By the Court. K.

[fol. 269] Wherefore, the said Stanley P. Ashe has here before your Honors the body of the said Joseph Valotta, together with the said Writ as therein he is commanded.

So answers your defendant.

S. P. Ashe, Warden.

Sworn to and subscribed before me this 26th day of November, A. D. 1924. John Francies, Clerk of Courts.

[fol. 270] EXHIBIT TO ANSWER

IN THE COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY, PENNA.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, John Francies, Clerk of the Courts of Oyer and Terminer. General Jail delivery and Quarter Sessions of the Peace, in and for said County, hereby certify that in the case of Commonwealth versus Joseph Valotta. Charge: Murder, at No. 17 February Sessions 1923, having been convicted of Murder of the First Degree on March 14th, 1923 was sentenced as follows:

"And now, June 28th, 1923, the sentence of the law is that you, Joseph Valotta, be taken hence by the Sheriff of Allegheny County to the Jail of that County from whence you came, and from thence in due course to the Western Penitentiary in Center County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the Warden or Deputy Warden of the Western Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity, of intensity sufficient to cause death, and the application of such current, to be continued until you are dead. May God in His infinite goodness have mercy on your soul."

The same remains of record in my office.

Witness my hand and official seal of said Court at Pittsburgh, Pa., this 25th day of November, A. D. 1924.

John Francies, Clerk of Courts. (Seal.)

[fol. 271] IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF HABEAS CORPUS

The President of the United States to warden of the State penitentiary for the Western District of Pennsylvania, Greeting:

We commond you in the name of the authority aforesaid that Joseph Valotta, under your custody detained, you have before the Honorable Judges of the District Court of the United States for the Western District of Pennsylvania, at the Federal Bldg., in the City of Pittsburgh, on November 5th, 1924, at 10 A. M., Eastern Standard Time, then and there to do and be subject to whatever our said Judges may consider in that behalf, with stay of execution of Joseph Valotta pending determination of this writ.

Witness the Honorable, the Judges of the District Court of the United States for the Western District of Pennsylvania, at Pittsburgh, this 15th day of October, 1924, and of the Independence of the United States the 149th year.

J. Wood Clark, Clerk. (Seal.)

[fol. 272] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING RETURN DAY

And now, October 29th, 1924, counsel for petitioner and for the Commonwealth consenting thereto, it is ordered that the return day of the Writ heretofore issued in this case is extended to the 1st day of December, 1924, at 10 A. M.

W. H. S. Thomson.

Certified from the record this 30th day of October, 1924.

J. Wood Clark, Clerk. (Seal.)

I hereby certify that this is a true and correct copy of the original Order of Court dated October 30th, 1924.

W. J. McFarland, Deputy Warden.

C. E. Larimer, N. P. (Seal.)

[fol. 273] [File endorsement omitted]

[fol. 274] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed December 1, 1924

The Replication of Joseph Valotta, to the return and answer made by Stanley P. Ashe, Warden of the Penitentiary for the Western District of Pennsylvania, respectively avers:

The allegation in the answer is denied: That the said Joseph Valotta is so restrained lawfully by virtue of a commitment issued out and by virtue of the President Judge of the Court of Oyer and Terminer and General Jail Delivery of the County of Allegheny, in the State of Pennsylvania, on the contrary relator's restraint is unlawful and in violation of his Constitutional rights.

F. A. Ammon, Geo. R. Wallace, Attys. for Relator.

Duly sworn to by Joe Valotta. Jurat omitted in printing.

[fol. 275] [File endorsement omitted]

[fol. 276] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND PETITION—Filed December 1, 1924

And now comes Joseph Valotta, by his attorneys, Franklin L. Ammon and George R. Wallace, Esq., and moves the Court for leave to amend his Petition filed in the above entitled case by adding to Paragraph No. 13 the following sub-section, towit:

(o) The indictments upon which your petitioner was tried were absolutely void and the procedure thereunder is void and of no effect, for the reason that in each of the said indictments were included a count for murder and a count for manslaughter, contrary to the provisions of the law of the Commonwealth of Pennsylvania.

Joseph Valotta, by Franklin L. Ammon, Geo. R. Wallace, His Attorneys.

[fol. 277] IN UNITED STATES DISTRICT COURT

ORDER AMENDING PETITION

And now, to wit, December 1, 1924, the within petition presented in open court, and upon consideration thereof the prayer of the petitioner is granted and it is ordered that the petition be amended by adding the averment above set forth, and supplemental reasons allowed filed.

W. H. S. Thomson, Judge.

[fol. 278] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PETITION

The Electrocution Act of Pennsylvania, June 19th, 1913, P. L. 528 (Purdon's Digest, Vol. 5, Page 5853) by authority of which Joseph Valotta is to be executed, is in violation and contravenes Article 3, Section 6 of the Constitution of Pennsylvania, (Purdon's Digest, Vol. 1, Page 150) which provides as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

(a) The Pennsylvania law of March 31st, 1860, Section- 74 and 75, P. L. 402 (Purdon's Digest, Vol. 1, pages 963 and 64) defining murder of the first and second degree and prescribing the punishment of murder of the first degree by hanging is in no wise re-enacted and published at length, although said Electrocution Act of 1913 amends, revives and extends the provisions of said Act of 1860.

(b) The Pennsylvania authorities have power to execute a defendant for first degree murder only by hanging; and the proposed electrocution of Joseph Valotta is not by due process of law.

(c) Said Section 75 of the Act of 1860 provides within ten days after sentence the Clerk of the proper Court of conviction shall transmit a full and complete record of the

conviction to the Governor; whereas, Section 2 of the Electrocution Act of 1913, directs the transmission of a full and complete transcript of the record within thirty days after sentence, or twenty days after final appeal. This latter provision revives, extends and amends the Act of 1860 without re-enacting and publishing at length sec. leg.

(d) Under Section 2 of said Electrocution Act of 1913, the Governor has no constitutional authority to direct the electrocution of Joseph Valotta on a transcript of the record of his trial and conviction in the absence of the original record.

[fol. 279] (e) Section 12 of the Electrocution Act of 1913 (Purdon's Digest, Vol. 5. Page 5854) provides that if any portion of the Act shall be declared invalid or unconstitutional, the entire Act shall thereupon be null and void.

F. A. Ammon, Geo. R. Wallace, Attys. for Petitioner.

Supplemental Reason

Mrs. Isabella Griffith, Juror No. 4, and Mrs. Wesley Hale, Juror No. 7, sat in judgment and were parties to the verdict in the Court of Oyer and Terminer of Allegheny County, Commonwealth vs. Joseph Valotta, Murder, at No. 17, and 19 February Sessions, 1923, in violation of the defendant's constitutional rights, there being no enabling statute in Pennsylvania since the nineteenth amendment to the Federal Constitution giving women a right to sit on juries; and the only qualified jurors under the Murder Act of Pennsylvania of 1860 being male qualified voters of Allegheny County.

F. A. Ammon, Geo. R. Wallace, Attys. for Petitioner.

[fol. 280] [File endorsement omitted]

[fol. 281] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—Filed December 19, 1924

[Caption omitted]

Appearances of counsel omitted in printing.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Ammon: If your Honor please, under the Federal code in this Valotta case we have the right to file supplemental reasons at any time, and I ask to have this embraced in the record. The supplemental reasons involve the form of the indictment, embracing manslaughter, or murder, which we say is against Murder Code of Pennsylvania, and also attacking the constitutionality of the Electrocution Act of 1913, both of which we feel are very important. And in addition to that, there were two women on this murder jury, which we say is without due process of law.

The Court: Was that question raised at any time?

Mr. Ammon: That question was raised in the Appellate Court.

Mr. Estep: As representing the Commonwealth, and also [fol. 282] as attorney for the Warden of the Westen Penitentiary, I object to the supplemental reasons being filed:

First. Because no notice was given to the Commonwealth of Pennsylvania that any such supplementals were to be filed.

Second. That no notice was given to the District Attorney of Allegheny County, that the original petition was to be filed and therefore, this being supplemental to the original petition, the objection goes to the original petition in connection with the above as to the supplemental reasons.

Third. The facts alleged in the supplemental reasons were not alleged or taken up before the Supreme Court of Pennsylvania, or at any intermediate step after conviction, and therefore cannot be the reason given in this

Court for the granting of a writ of hebeas corpus, or a release under such writ.

The Court: I will permit the reasons to be filed, overruling the objection and allowing a bill of exception in favor of the respondent. The effect to be given to any of these reasons, the Court will not at this time undertake to pass upon. Simply, I allow the reasons to be filed, and have taken this into consideration in connection with the decision of the case.

Mr. Ester: The Commonwealth of Pennsylvania and the Warden of the Western Penitentiary of Pensylvania, respondents, move that the writ of Habeas Corpus in this case be dissolved, and the prisoner remanded to the custody of said Warden, for the purpose of having carried out the sentence of the Court of Oyer and Terminer and General Jail Delivery of Allegheny County for the following reasons:

First. Because no notice was given to the Commonwealth of Pennsylvania that any such supplementals were to be filed.

Second. That no notice was given to the District Attorney of Allegheny County that the original petition was to be filed, and therefore, this being supplemental to the original petition, the objection goes to the original petition in connection with the above as to the supplemental reasons.

[fol. 283] Third. The facts alleged in the supplemental reasons were not alleged or taken up before the Supreme Court of Pennsylvania, or at any intermediate step after conviction, and therefore cannot be the reasons given in this Court for the granting of a writ of habeas corpus, or a release under such writ.

The Court: I will permit the reasons to be filed, and overrule the objection, allowing a bill of exception in favor of the respondents. The effect to be given to any of these reasons, the Court will not at this time undertake to pass upon. Simply, I will allow the reasons to be filed, and have taken this into consideration in connection with the decision of the case.

Mr. Estep: The Commonwealth of Pennsylvania and the Warden of the Western Penitentiary of Pennsylvania, re-

spondents, move that the writ of habeas corpus in this case, be dissolved and the prisoner remanded to the custody of said Warden, for the purpose of having carried out the sentence of the Court of Oyer & Terminer and General Jail Delivery of Allegheny County, for the following reasons:

First. This Court has no jurisdiction to issue a writ of habeas corpus in the case at bar.

Second. No notice was served upon the District Attorney of Allegheny County, that a petition was to be presented asking for a writ of habeas corpus in this case. No notice was served upon the District Attorney of Allegheny County, that a writ of habeas corpus had been granted. No copy of the petition and the facts alleged therein for the reason for the habeas corpus, was ever served upon the District Attorney of Allegheny County, and for that reason this writ should be dismissed.

Third. That this Court has only jurisdiction to issue a [fol. 284] writ of habeas corpus, is found under section 753 of the Revised Statutes, and there is nothing in this case and the facts alleged in the petition, or any part of the record, that shows any constitutional rights of the prisoner have been violated, or that he is held without due process of law.

Fourth. This writ should be dissolved, further, because all of the facts alleged in the petition asking for said writ, were passed upon in a motion for a new trial by the Court of Oyer and Terminer of Allegheny County, and by the Supreme Court of Pennsylvania on an appeal thereto; and its judgment having been rendered adverse to him, the principle of res adjudicata applies, and for that reason alone the question cannot be opened here.

Fifth. For the reason that having failed to raise any constitutional questions that would bring the case under the review of Section 753 of the Revised Statutes on appeal to the Supreme Court of Pennsylvania, and those questions can not be passed upon by this Court.

Sixth. Further, because a prisoner serving a sentence, or having sentence imposed upon him by the State Court, cannot be discharged on a writ of habeas corpus, unless

it would appear upon the face of the record in this case, that the Court having jurisdiction of the case in the first instance, did not in fact have jurisdiction or at some time during the proceedings lost jurisdiction of the case.

Seventh. Further, because this prisoner having been tried before a court of competent jurisdiction and having taken all the steps provided for under the procedure of the Commonwealth of Pennsylvania and the decision having been adverse to him in the Supreme Court of this State, he is precluded from coming into this Court, and this Court has no jurisdiction to grant in this case.

[fol. 285] The Court. It is, of course, true that where a tribunal of the State has jurisdiction of the subject-matter and of the party, its judgment will not be disturbed by any irregularity, any mere irregularity, in the procedure which do not go to the fundamental constitutional rights of the prisoner; so that the final question will be, if the Court had jurisdiction in the first instance, which it undoubtedly had, whether during the course of the proceedings it lost that jurisdiction for any of the reasons appearing upon the record or in the evidence offered. If such fact appear, then the Court has jurisdiction, and would not hestitate to exercise it.

As the motion practically asks the Court to pass upon these questions in advance of the hearing, the motion is overruled and an exception is noted in favor of the respondents.

Mr. Wallace: In order that the Court may follow the testimony which we are about to offer, I wish to make a preliminary statement as to the position of the petitioner. The record frames an issue involving the life of Joseph Valotta, convicted of murder, and sentenced. That is the issue which presented itself to me as counsel, when I became attorney in this case. But a more thorough study of this case has so amazed me to the fundamental rights of citizens of Pennsylvania, that it now presents itself to me primarily as a case for the defense of those fundamental rights which are so granted. I shall not at this time discuss the questions of law involved, our position being fundamentally that this prisoner has not had due process of law, and that he has not had the equal protection of the laws, granted by the Constitution. Due process of law

is established,—assuming that the procedure is one which [fol. 286] does not cut to the very roots of procedures—by the State, which is within the constitutional guarantee. In other words, it is entirely possible that a procedure which would be due process of law in one State, under the established statutory practice and procedure in that State, would not be due process of law under the established practice and procedure in another State. Because the prisoner is entitled to be tried as others are tried—in other words, he is entitled to equal protection of the laws, and it is necessary, to sustained this conviction, that it should not only have been a procedure which would be tolerated by the Federal Constitution, but it must also be a procedure which has been properly adopted by the State, and which is the usual and ordinary method for trying such offenses. Now, the points in which we maintain that the procedure here is not due process of law, and is not the usual and ordinary practice in this State, are as follows:

First. That on two separate indictments for murder, this prisoner was tried before the same jury. That that was done without any action of the Court in the way of consideration as to whether or not this procedure would be injurious to the petitioner, confound him in his challenges, or prejudice and distract the jury. That he was not given his twenty peremptory challenges in each particular case. That the Court at no time considered the question as to whether or not he would be prejudiced or the jury distracted by trying these two cases together. That evidence was permitted to be offered in this case, which would not be admissible—I mean growing out of the fact that these two cases were tried together—which would not be permissible to be offered in either one of the cases separately; that is to say, there was evidence offered jointly, and that [fol. 287] all of the evidence offered would not have been admissible in the separate trial of either particular case. That this prisoner was denied the benefit of the rules of evidence governing such cases in the State of Pennsylvania, and that he was also tried before an unconstitutional jury, and that this whole procedure is contrary to the law of the State of Pennsylvania, and not the customary and ordinary practice within said State.

Now, it devolves upon us to show what the customary

and ordinary practice of Pennsylvania is, and I take it that that perhaps is established in three ways: Our law, of course, is based fundamentally on the common law. It is modified by statutes, and it may be modified by practice. We will offer no evidence on the question as to what the common law is. The Court takes judicial notice of that common law, and our briefs will cover that. We will not offer any testimony in regard to the statutes of Pennsylvania, because this Court takes judicial notice of this. But the third point as to whether or not it has been customary in Pennsylvania to try capital crimes in the manner which was adopted and followed in this case, is a matter in a sense—and we propose to show by expert testimony, that the practice in this case is not known, has never been followed, and is a violent departure from the customary and ordinary practice in the State of Pennsylvania in trials of this kind. So this prisoner has not only not had due process of law, but he has not had the equal protection of the laws, which is granted under the Constitution.

Mr. Estep: There is no better evidence of the mode of procedure in the State of Pennsylvania than the rulings of the Supreme Court of the State of Pennsylvania, and undertaking to call expert witnesses to tear down what [fol. 288] the Supreme Court has already passed upon and declared legal, would be to my mind, undertaking by a layman to uproot the decisions of the Supreme Court of this State. I can give your Honor decisions, and so can Mr. Wallace, where this thing has been passed upon by the Supreme Court, and in recent decisions too.

The Court: You mean it is a legal proposition to try a man on two distinct offenses before the same jury?

Mr. Estep: Absolutely.

The Court: Not trying them separately, that is, the testimony of the Government on one hand, and the testimony on the defendant's side,—introducing them all together?

Mr. Estep: Yes, sir: all together.

The Court: We have not reached the question, We will hear you, of course.

[fol. 289] JOSEPH VALOTTA, petitioner, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are the prisoner in this case?
A. Yes.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. How long have you been a citizen of the United States?
A. I can hardly remember. I got my first papers one time about fifteen years ago. Then I didn't use it. Then I got my second one about six years ago.
Q. I show you a paper marked Exhibit No. 1, and ask you if that is your certificate of citizenship?
A. Yes.

Mr. Wallace: Exhibit No. 1 is offered in evidence, for the purpose of proving the defendant is a citizen of the United States.

(No cross-examination.)

Mr. Wallace: We offer in evidence the records in this case, of the Court of Oyer & Terminer of Allegheny County, at No. 17 February Term, 1923, and at No. 19 February Term, 1923, together with the printed testimony on the appeal to the Supreme Court, and the record showing the appeal to the Supreme Court, and the dismissal thereof; also the record showing the petition presented to the Supreme Court for a re-argument, with the brief attached thereto, and the action of the Supreme Court thereon, all of which are attached to the petition in this case. I now beg leave to file the revocation as provided by the Federal Statutes.

[fol. 290] JOHN M. PATTERSON, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. Judge Patterson, you are a member of the bar in the County and State of Philadelphia?

A. Yes, sir.

Q. How long have you been a member of the bar?

A. For twenty-eight years.

Q. During that time, will you state whether or not you have had familiarity with the criminal practice in the County of Philadelphia?

A. I have had.

Q. To what extent?

A. Well, I have tried a number of cases as attorney for the defendant. I was in the District Attorney's office of Philadelphia County, for about nine years, and I was on the Common Pleas bench of Philadelphia County for about nine years, and sat for many months during those nine years in the criminal courts of the County of Philadelphia.

Q. Are you familiar with the usual and ordinary practice in the trial of criminal cases, in your County and your State?

A. Yes, sir.

Q. Will you state whether or not it is in accord with the ordinary and usual practice and custom in the trial as indictments for murder, in your county and in your state that two separate and distinct indictments charging the same defendant with two separate and distinct acts of murder, should be tried together before one jury at the same time; and whether or not the procedure referred to is in accordance with the established practice in the trial of such cases in the State of Pennsylvania?

[fol. 291] Mr. Estep: We object to the question because the witness is not competent to testify or give an answer on that question. His experience is only based upon the precedure in one county in the State of Pennsylvania. Another reason for objecting to this testimony, is that Franklin A. Ammon, counsel for the defendant at the trial

of this case in the Court of Oyer & Terminer and General Jail Delivery, agreed that both indictments be tried together, for the reason that the facts to be produced would be the same in both cases. Therefore, there is no reason for not trying them both together.

The Court: It must be shown that that appears of record.

Mr. Estop: There is no objection on record, from Mr. Franklin A. Ammon, objecting to the trial of these indictments together.

Mr. Wallace: I take it that your objection is that this is res adjudicata?

Mr. Estep: Yes, and I object to his competency.

The Court: If this Court has jurisdiction to hear and determine the questions properly raised in this proceeding, then it is the duty of the Court, under the Federal Statutes, to look behind mere form, and even records, to the very heart and substance of the case. That a defendant, charged with two separate homicides, in two separate indictments, is entitled as a right, to two distinct trials before two distinct juries, is a proposition so fundamental in my mind, as to scarcely be open to argument. Whether such rights in any particular case may have been waived to such an extent as bars the prisoner from afterwards [fol. 292] asserting it in another tribunal, is a very different question. But in the absence of uncontrovertible authority, I would have to hold as an original proposition, that the defendant, under those circumstances, was entitled, if he insisted upon his right, to two distinct trials before two separate juries. No authority has been quoted thus far by counsel for the defendant, that would go beyond passing upon the mere question under the facts as they there were presented, and com- far short of sustaining the general proposition that the State has the right against the protest or objection, or as a fundamental question of right, to try two separate indictments, or two distinct homicides, before the same jury. As this particular question is perhaps one of the most vital in the case, I think it is not only the right, but the duty of the Court, to hear the evidence on the subject, not only the decisions of the Supreme Court, so far as they give us light. We may have some knowledge as lawyers, of what the common law is, and we may be further enlightened by experts who are

familiar with the practice in Pennsylvania, as to what such practice is and has been. I think the witness has abundantly qualified himself to speak, the weight of his testimony, of course, being a matter for ultimate consideration. The objection is therefore overruled and an exception is noted for the respondents.

Mr. Estep: I ask for leave to cross examine the witness before he answers the question.

The Court: You may do so.

Mr. Estep:

Q. How many murder cases have you sat in during your time — Common Pleas Judge of Philadelphia County?

A. I should say fifty, at least.

Q. Did you try that many? You mean you sat during the course of the trials of fifty?

[fol. 293] A. No, I should say I actually tried while I was on the bench, ten or fifteen.

Q. And out of those ten or fifteen which you tried while you were on the bench, how many of them on two indictments for the killing of two separate people by the defendant?

A. Possibly five or six.

Q. Can you give us the names of any of those?

A. Commonwealth vs. Eels.

Q. Do you know the citation?

A. It is not reported. Are you talking about reported cases?

Q. No. You are speaking now of cases that you tried, five or six of them were cases where there were two indictments?

A. Yes, where there were two killings by one man.

Q. Were there any objections at that time, or any question as to their being tried together or separately?

A. There was no question ever raised, either when I was on the bench or in the District Attorney's office, or acting as private attorney for the defense, as to the impropriety of trying two separate murder bills before the same jury at the same time. There never was any question as to the impropriety. It was admittedly improper to do so, and went to destroy the fundamental rights that a defendant

would have under such circumstances, and was so recognized.

Q. Did that apply where there were possibly two or more defendants to the same killing?

A. It also applied to where there were two defendants to the same killing. Under such circumstances, each defendant was tried separately. I might say this, that in Philadelphia County, where the Judges not only elected or appointed as Philadelphia Judges, sit, but where possibly ten or fifteen Judges from all over the State of Pennsylvania come from other counties and sit by assignment, that until this Valotta case was reported in the Supreme Court Reports, the Judge himself would step in and prevent a defendant from being tried for two different murders at the same time before the same jury.

Q. Then it was a question of the discretion of the Court in the County of Philadelphia. Isn't that true?

A. It depends on what you mean by discretion.

Q. There was no law and no law of the State of Pennsylvania and no ruling of the Supreme Court of the State, in the way of the Judges trying two or more defendants together for the same killing, or trying only one defendant for one or more killings, except the desire and discretion of the Court of the County of Philadelphia?

Mr. Wallace: Objected to as not a qualifying question. The witness is called not to testify as to decisions, but only as to the established practice in criminal procedure in his jurisdiction.

[fol. 294] The Court: I think the Judge is able to answer the question.

A. My answer is this: that until this case of Commonwealth vs. Valotta, reported in 279 Pa. p. 80, I think, came to the attention of the Judges and the lawyers in Philadelphia County, it was regarded just as his Honor, Judge Thomson, has said, as beyond question that the fundamentally constitutional right of a defendant was that he could be tried only for one murder at one time, before one jury, and that was based upon what we believed the common law to be, what we believed the custom in Pennsylvania from the time of William Penn down, to be, and what we believed the various statutes that had been passed in the

meantime, regulating the manner of pleading indictments and trying them, to be. There is one Act I can recollect, I think of 1860, dealing with the trial of murder cases, that provides that a defendant charged with murder shall be required to answer one charge, and no more, or words to that effect.

Mr. Estep:

Q. Then you hadn't heard of the case of Commonwealth vs. Brown, before the Valotta case?

A. Yes.

Q. Hadn't that been taken up by the Judges?

A. Yes, sir, that case was taken up. You won't find from the first page of it, until the end, the last page, that reports that decision, one word about a man being tried for two murders at one time. If you will show me any reported decision where it refers to the defendant being tried for two murders at the one time, I will admit that I don't know what I am talking about.

Q. Anybody reading the decision, I think, would know that it was done at the same time. I will ask you this: Had you read about the case of Commonwealth vs. Russogola, where they convicted four men for the killing of one man, and sustained by the Supreme Court of Pennsylvania?

[fol. 295] A. I would like to see what it says about trying a man more that one time.

Q. It is cited in Commonwealth vs. Valotta.

The Court: It is your position that as a matter of right—I am speaking of fundamental rights, not waivers of rights—is it your position that against the protest or in the presence of the silence of the defendant, who is charged with two separate homicides in two distinct indictments, you have a right to compel the trial before one jury. Is that your position?

Mr. Estep: Our contention is that it is within the discretion of the Court and without objection on the part of the defendant, that we have the right.

The Court: Based on what?

Mr. Estep: The practice and procedure in the State of Pennsylvania, and the rulings of the Supreme Court, in all the cases that have gone before them.

The Court: The ones you have cited?

Mr. Estep: Four men for one killing, in State vs. Russogola.

Mr. Wallace: This examination is in the nature of cross examination as to the qualification of the witness.

A. The answer is no, except that of course I bow to whatever our Supreme Court rules or has ruled in the Valotta case. I don't set myself up to say that what they decide is not the law, nor so regarded by those who practiced it or administered it.

[fol. 296] Mr. Wallace:

Q. Will you state whether or not it was the established practice in criminal procedure in your county and your State, so far as you know it, after a prisoner had been arraigned on a certain indictment for murder, to which he pleads Not Guilty, and the District Attorney joins issue thereon, he could then before trial, be arraigned on another indictment, the same similiter issue being perfected, and the two tried together before the same jury?

A. No.

Q. Will you state whether or not it is the practice in your county and in Pennsylvania, so far as you know it, that in murder cases the prisoner should have twenty peremptory challenges upon each indictment?

Mr. Estep: Objected to, because it is written in the statute books of Pennsylvania, as to how many challenges a prisoner is entitled to.

The Court: In other words, he is granted twenty?

Mr. Estep: Objected to for the further reason that the record does not apply to this case, he having used only seventeen challenges during the period of time he was picking a jury.

Objection overruled and an exception noted to respondents.

A. The Act of Assembly provides that he shall have twenty challenges in each case he is tried for. I mean, it has been recognized as the practice in Philadelphia County and the surrounding counties. I think I am more or less familiar with the practice in the adjoining coun-

ties, that where there are two defendants tried for an offense, each shall have the same number of challenges.

Mr. Wallace:

Q. Will you state whether or not it is the established practice in criminal procedure, in your county and in the [fol. 297] State of Pennsylvania, so far as you know it, to exclude in the trial of a murder case, evidence in regard to any other separate and distinct crime?

A. As a general proposition, it is. There are Supreme Court decisions, which you have in your brief, that distinctly hold that it is a fundamental error in the trial, a reversible error, to refer to the commission of another crime.

Mr. Estep: Objected to because the decision of the Supreme Court hald that where the question of good character is opened up.

A. If you will let me finish my answer;

Mr. Estep: I am objecting to the question being asked.

The Court: You may finish your answer, and then objection can be made.

A. I was saying that as a general proposition, that is the law, but there are exceptions to it. One of the exceptions is where the two offenses are cognate, where—we will take a homicide case, where the killing was simultaneous—where if a man hurled a dynamite bomb into a factory, destroying the lives of many people, the Courts, as I understand the ruling, would permit the reference to all of the homicides as being part of the res gesta. The other exception is where the defendant puts his good reputation in evidence, he can then be examined as to certain things in his past life, including other offenses.

Cross-examination.

Mr. Estep:

Q. Your practice in Philadelphia County in reference to costs in a misdemeanor case, your Courts never charge on the costs, do they?

A. Sometimes we do, and sometimes we do not.

Q. What is your general practice?

[fol. 298] A. Our general practice is that in order to dispose of the business, which is very large in Philadelphia county, the criminal business, costs are not imposed upon the parties. That rule is not universal or absolute.

Q. You know that is not the rule in Allegheny County?

A. I know it is not the rule in Allegheny County, but I should think there is a great difference, if I may be allowed to add, between collecting $19.80, or whatever it is, and trying a man for two murders at the same time.

Q. It is not the practice in Philadelphia County to charge on the costs in a misdemeanor? You can answer that yes or no.

A. I have already answered that it is not the absolute practice.

Q. And it is not the law of Pennsylvania that you should not charge, is it,

A. As I understand the law of Pennsylvania, it *si* within the discretion of the Judge.

Q. Isn't it a matter of statute, that where there is a misdemeanor, that the law must, and in the case of a verdict of Not Guilty, the jury shall p*alce* the costs in such proportion as they see fit, on either party?

The Court: The practice as to the question of costs in Philadelphia, does not give us much light here.

[fol. 299] WILLIAM A. MCCONNELL being duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are a member of the Beaver County bar, State of Pennsylvania?

A. Yes.

Q. How long have you been a member of the bar?

A. Thirty years.

Q. You are a member of the bars of the Courts of Appeal also, and the Federal Court?

A. Yes, sir.

Q. In the course of your practice, have you had familiarity with the established mode of criminal procedure in your county and in your State?

A. Yes, sir.

Q. Have you had any public office?

A. I have acted as Assistant District Attorney a number of times.

Q. Have you had considerable experience in criminal practice?

A. Yes, sir.

Q. Are you familiar with the established procedure in criminal practice?

A. In our county, yes.

Q. Do you know anything about it in other counties?

A. Only to a certain extent.

Mr. Wallace: Do you want to cross examine?

Mr. Estep: Yes, sir.

Mr. Estep:

Q. How many murder cases have you ever tried?

A. I suppose a dozen.

Q. As a Commonwealth attorney or as attorney for the defense?

A. Both ways.

Q. How many have you tried for the defense, wherein there was a question as to murder of the first degree?

A. I couldn't tell you exactly how many.

Q. Have you had a case where there was a conviction of murder in the first degree, which you defended?

[fol. 300] A. I couldn't tell you.

Q. That is one thing a lawyer usually never forgets.

A. I know there was never any conviction of murder in the first degree where I represented the defendant, in which the sentence was carried into execution.

Q. Rather, where the jury returned a verdict of first degree. I don't care about the ultimate end. Was there ever a verdict of first degree rendered in a case where you were the defendant's counsel?

A. Yes.

Q. Was there ever a verdict of first degree rendered in a case where you represented the Commonwealth?

A. I couldn't tell you that definitely.

Q. You have tried about a dozen cases, you say, and you can't remember out of that dozen, a first degree case on either side of the table?

A. No, sir.

Q. Was there ever a case you defended or prosecuted, where the question arose of trying one man on two indictments before the same jury?

A. No, sir.

Mr. Estep: I object to this witness, as not having qualified to pass as an expert on this question.

The Court: I think the witness has qualified himself. The weight of the testimony, of course, is a question for the Court. The objection is sustained, and an exception noted to defendant.

Mr. Wallace:

Q. Will you state whether, from your knowledge as a practicing lawyer, and as Assistant District Attorney, as you have testified, it is the established mode of criminal procedure in the State of Pennsylvania and your county, to try two separate and distinct indictments for murder, following two separate and distinct acts, before the same jury at the same time?

A. It is not.

Q. Before this Valotta case, did you hear of any such a procedure?

A. Never heard of such a procedure at all.

Q. Will you state whether or not it is the established mode of criminal procedure in your jurisdiction, and so far as you know, in the State of Pennsylvania, that a prisoner indicted for murder, after having been arraigned and pleaded Not Guilty, and the Commonwealth having pleaded and a similiter issue framed, that a similar arraignment, plea and issue joined should forthwith follow, and the two indictments tried before one jury?

[fol. 301] A. It is not.

Q. Two separate homicides, I mean. What is the established practice in regard to trying two separate and distinct indictments for felonies involving two separate and distinct acts?

A. They are tried separately.

Q. State whether or not it is the established practice, as you know it, that in a homicide indictment the defendant should have twenty peremptory challenges for each endictment?

A. That is the practice.

Q. State whether or not it is the established practice in the criminal courts of Pennsylvania, as you know them, that evidence should be admitted in the trial of one homicide case, in regard to separate and distinct crimes?

A. It is not.

Cross-examination.

Mr. Estep:

Q. Do you know as a fact that in Beaver County it never was——no trial was ever held where a man was tried on two indictments of homicide, before the same jury?

A. I know it is not.

Q. How do you know?

A. I never heard of any.

Q. Because you never heard of it? Do you know the records in Beaver County will show that fact?

A. I never heard of any, and I have been there for thirty years.

Q. Did you ever hear of the case of Commonwealth vs. Russogola in Allegheny County?

A. No. I was rather amazed when you mentioned the method in which that case was tried. I wouldn't be tried in Beaver County in any way like that, I know.

Q. So your knowledge of the law applicable to neighboring counties in the State of Pennsylvania, in general, is limited?

A. Surely.

Q. You never heard of the case of Commonwealth vs. Brown, tried in Allegheny County?

A. Surely, in the reports.

Q. Did you read that?

A. Sure.

Q. But you just testified that until you read the case of Commonwealth vs. Valotta, you never knew that such a thing could take place in Pennsylvania?

A. I don't think I testified to that.

[fol. 302] Q. That is my recollection. What did you testify to?

A. I didn't testify anything as to the Valotta case.

Q. I think you did.

A. No. That was Judge Patterson.

Mr. Estep: I want to renew my objection to the testimony given by this witness, and ask for an exception.

Exception noted.

CURTIS H. GREGG, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. I believe you are a member of the bar of Westmoreland County, Pennsylvania?

A. Yes, sir.

Q. And have been for how long?

A. Thirty-six years.

Q. You have been a member of Congress also, I believe?

A. Yes, sir.

Q. Have you ever had any other public office?

A. District Attorney of Westmoreland County by appointment for one year.

Q. Have you had during the course of your thirty-six years' practice, experience with criminal cases?

A. Yes, sir.

Q. Have you had a large experience with criminal cases?

A. Well, I think fairly large; practically as much as any other member of the bar in our county.

Q. Have you had professional employment which would bring you particularly in touch with criminal law?

A. I was chief counsel in 1910, at the time of the bituminous coal strike in Westmoreland County. I suppose, counting the cases from disorderly conduct to murder, I was interested in probably a thousand cases of a criminal character, that year.

Q. You are a member of the bar of the Courts of Appeal and the Federal Courts?

A. Yes, sir.

Q. Are you familiar with the established mode of pro-
[fol. 303] cedure in the trial of criminal cases in Pennsylvania?

A. I am.

Q. In your county?

A. I am, I think, and probably some of the adjoining counties.

Cross-examination.

Mr. Estep:

Q. Are you opposed to capital punishment?

A. No, sir.

Q. How many murder cases have you ever defended?

A. Well, I presume fifty or more.

Q. Did you ever have any first degrees among those?

A. Two of them. One of them was appealed to the Supreme Court now.

Q. And that was as counsel for the defendant?

A. Yes, sir.

Q. Did you ever have a client or defendant who had more than one indictment against him for homicide?

A. Yes, sir, the Commonwealth vs. Eugene Kuhn.

Q. How many indictments?

A. Two indictments for killing his father-in-law and his mother-in-law at practically the same time.

Q. And when you went into court, did you ask the Court for a severance?

A. No, sir. There were two separate bills of indictment. They called the case wherein the husband was killed, first, and made no effort to call the other case at all.

Q. The District Attorney elected to try one at a time?

A. That was the usual practi[illegible] in our county.

Q. Do you know of any othe[illegible] they tried a man up there on two indictments?

A. No. I don't think that ever happened in this county.

Q. Where more than one defendant was charged with the killing of one person, they were tried together?

A. Not always.

Q. Have you known it to take place in your county?

A. Yes, there was a case tried week before last, like that, where two defendants were charged in the same bill of indictment.

A. And for the same killing?

—. ——.

[fol. 304] Mr. Wallace:

Q. Will you state whether or not it is the established mode of criminal procedure in your county, and in the State of Pennsylvania, so far as you know it, that where a prisoner is indicted for two separate homicides, constituting distinct acts, that he should be tried on both of those indictments at the same time before the same jury?

Mr. Estep: Objected to, for the reason that the witness has not qualified as an expert on the mode of procedure in the County of Allegheny, or in the State of Pennsylvania generally, and therefore cannot testify as to the rule of procedure in this case.

The Court: He rather limits his knowledge of the practice, perhaps to Westmoreland County and some of the other adjoining counties.

Mr. Wallace: I will limit the question.

Q. (Question read.)

A. No.

Q. What is the established mode of criminal procedure where a man is indicted on two separate and distinct indictments for separate and distinct murders?

Mr. Estep: The objection is renewed, that this witness has not been qualified and did not answer the question last asked by counsel for the relator, and Allegheny County being an adjoining county to Westmoreland County, the witness has not undertaken to testify that he knows anything about the procedure.

The Court: I think the question was a little too broad.

Mr. Wallace:

Q. Within what limits do you feel competent to testify as to the practice—within what territorial limits?

A. Well, I have tried cases in Westmoreland, and have refused to try them in Allegheny County, and have tried

them in Fayette, Armstrong, Indiana and Blair. I attempt at least to keep myself posted in relation to the decisions of the Supreme Court and the lower courts, on the proper procedure and practice.

Mr. Wallace:

Q. Are you acquainted with the practice of the counties you have named?

A. In a general way, I am, I think.

[fol. 305] Mr. Estep: This is with reference to murder cases, if your Honor please. The question is confined to murder cases.

A. I have never tried any murder cases outside of Westmoreland County.

Mr. Estep: I renew my objection.

Mr. Wallace:

Q. I will put my question this way: I will ask you to limit your answer to Westmoreland County and the Counties you have named, in which you say you have a general acquaintance with the practice.

Mr. Estep: Practice in equity, practice in the Common Pleas might be the subject of the witness' knowledge, but where this involves a murder case, one of the qualifications should be included in the question asked.

The Court: Make your question a little more specific.

Mr. Wallace:

Q. I will ask you whether or not you are familiar with the practice in the trial of murder cases in Westmoreland County.

A. I mean Westmoreland County. I never tried a murder case in any of the adjoining counties.

Q. Then I will ask you to limit your answer to the established mode of criminal procedure in Westmoreland County.

Mr. Estep: Then I object to his, because the witness has not qualified to pass upon the procedure of the State of Pennsylvania generally, and in the County of Allegheny.

The Court: The objection is overruled and an exception noted, the answer being confined to a certain portion.

Mr. Wallace:

Q. Will you state whether or not in the trial of murder cases in Westmoreland County, it is the established mode of procedure to try the same prisoner on two separate indictments, on two separate offenses, before the same jury?

A. It is not.

Mr. Estep: Objected to as leading.

Objection overruled.

[fol. 306] Mr. Wallace:

Q. Will you state whether or not it is the established mode of criminal procedure, in Westmoreland County, where a prisoner has been arraigned on an indictment for murder, but has pleaded Not Guilty, and the Commonwealth has answered similiter, and the issue has been so framed, that immediately another indictment should be produced in court, for a separate homicide, upon which the prisoner is arraigned, to which he pleads Not Guilty, and the Commonwealth pleads similiter, and thereupon these two indictments should be tried together before the same Jury?

A. It never has, to my knowledge.

Q. Will you state whether or not it is the established practice in the trial of murder cases in Westmoreland County, that the prisoner, should have twenty peremptory challenges for each indictment, charging a separate offense?

A. Yes, sir.

Q. Will you state whether or not it is the established practice in the trial of homicide cases, in Westmoreland County, that evidence can be admitted with respect to any other separate and distinct crime?

A. No; only in the event that evidence of good character is set up by the defendant, or where probably it is necessary to prove the commission of another offense as part of the res gesta.

Cross-examination.

Mr. Estep:

Q. In this case, you spoke of, that was tried a week ago, where two persons were put on trial, having been jointly indicted for homicide, there was only twenty challenges allowed for both men in the course of that trial. Isn't that true?

A. I couldn't tell you.

Q. What is your procedure and practice in Westmoreland County in cases of that kind?

Mr. Wallace: Objected to for the reason that this whole matter is regulated by an express Act, which provides that where several men are indicted for the same crime, they may be tried together, unless any one of them asks for a severance, which shall be granted, and that each shall have twenty peremptory challenges.

The Court: I think there is a fundamental distinction between two separate indictments against two people, and the question of the several rights of the defendants when they are jointly indicted. That is a different matter altogether. In the Federal courts in the latter case. they have only the ordinary and single right of challenge, although there might be twenty, but that is because they are tried together jointly, and they act in a sense, are joined. They are treated as one offense, and perhaps it is regulated by [fol. 307] Federal statute. That, of course, is not the question we are trying here. That involves the question of a severance, and many other questions.

[fol. 308] George H. Rowley, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are a member of the bar of Mercer County Pennsylvania are you?

A. Yes, sir.

Q. Where do you reside?

A. Greenville.

Q. How long have you been a member of the bar of the State of Pennsylvania.

A. Something more than sixteen years.

Q. You are a member of the Courts of Appeal and of the Federal Courts also?

A. Yes.

Q. In the course of your practice, have you become familiar with the established mode of criminal procedure in your county?

A. I have.

Q. Have you ever held any public office?

A. Yes. I served as District Attorney of Mercer County.

Q. For how long?

A. About seven years.

Q. Have you had a private practice in criminal cases?

A. To some extent.

Q. Are you familiar with the established mode of criminal procedure in Mercer County, in homicide cases?

A. I think so.

Mr. Wallace: Do you want to cross examine the witness?

Mr. Estep: Yes.

Mr. Estep:

Q. Are you District Attorney of Mercer County now?

A. No.

Q. When were you District Attorney?

A. From 1912 until late in 1919.

Q. How many murder cases did you try as District Attorney of Mercer County, during your term of office?

A. I couldn't be exact. I would say more than twenty-five, possibly thirty-five.

Q. And were any of those, cases where the defendant had [fol. 309] more than one indictment against him charging homicide?

A. I think not.

Q. That question never came before you as District Attorney of Mercer County, in the actual practice of the law?

A. Not the precise question raised.

Mr. Estep: I object to the witness' testimony for the reason that he has not qualified himself in any place but Mercer County, and has not qualified himself in Mercer County because the question never came before him.

Mr. Wallace:

Q. Are you familiar with the practice in felonious cases in Mercer County?

A. Yes.

Q. Have you had experience with the trial of indictments for felonies?

A. I have.

Mr. Estep: My objection still stands.

The Court: The objection is overruled and an exception noted to respondents.

Mr. Wallace:

Q. What is the established mode of procedure in the trial of criminal cases involving major felonies, in your county, in regard to the trial of the same prisoner on two separate indictments charging him with two separate and distinct acts, before the same jury at the same time?

A. That is not the practice, has not been, in Mercer County.

Q. What is the practice?

A. The practice is that they have separate trials before separate juries.

Q. Does that apply to all felonies?

A. Except that there are some felonies on which, by statute, a defendant may be tried for more than one crime, but that is in the case of larceny and receiving stolen goods, may be joined in the same indictment and tried at the same time. There is another Act that provides that distinct acts of embezzlement may be tried together.

Q. Eliminating those statutory exceptions, are there any exceptions to the rule?

A. None that prevail in Mercer County.

Q. In these felonies not within the statutory exceptions, is it the established mode of criminal procedure that a prisoner having been arraigned and having pleaded Not Guilty, and the Commonwealth having joined issue, that

he should be forthwith arraigned on another felonious charge, an issue similiter framed, and the two tried together before the same jury?

A. That is not the practice in Mercer County.

[fol. 310] Q. It is the practice that a man under any circumstances should not have his full number of peremptory challenges to each separate and distinct crime charged?

A. It is not the practice.

Q. Is it the practice in felony cases, that evidence should be admitted—limit this to murder cases—that evidence should be admitted in regard to his having committed other crime?

A. The general rule is that evidence of other crimes is excluded, except in certain few exceptions, which are clearly defined. The general practice is that evidence of other crimes may not be admitted.

Cross-examination.

Mr. Estep:

Q. From your experience in Mercer County, do you know of any case where there were two indictments against a defendant for a double homocide?

A. I can't recall a particular case no. I would say that I don't think there was any during my time.

Q. Then there is no practice or procedure that you are qualified to pass on, never having been passed on by the Court of Mercer County, to your knowledge?

A. The *reg*eral rule as applied by——

Q. You were asked if it wasn't the practice and procedure in Mercer County, and I ask you if anything like that ever happened, and you said no.

Mr. Wallace: He testified as to felonies.

The Court: His right to speak does not depend on whether this particular question was raised before the courts of Mercer County during his term. He speaks as a lawyer, with knowledge of the general practice of the law; and as connected with his practice for a certain number of years. He undertakes to speak as to what the practice is, with relation to trying two separate indictments before the same jury.

Mr. Estep: I move the witness' testimony be stricken from the record, he not having qualified as a witness on the practice and procedure in Mercer County.

The Court: The witness, I think is qualified to speak as to the practice in criminal cases in Mercer County. He speaks first as a lawyer, with a general knowledge, presumably, of criminal law, and with a knowledge of the statutes of the State of Pennsylvania, and coupled with that, with a knowledge of sixteen years' practice in the County of Mercer. This clearly qualifies him to speak on the subject, the weight of his testimony being a matter for the Court. The objection is overruled and exception noted.

[fol. 311] Albert Thomas, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. I believe you are a member of the Bar of Erie County?

A. Crawford County.

Q. Where do you reside?

A. Meadville.

Q. How long have you been a member of the bar of Crawford County?

A. Since 1905.

Q. And you are a member of the State Courts of Appeal and the Federal Courts.

A. I am.

Q. In the course of your practice, have you acquired familiarity and knowledge as to the established mode of criminal procedure in your county?

A. I have.

Q. Have you had a considerable amount of criminal practice yourself?

A. I served as District Attorney for two terms, eight years.

Q. And outside of that, did you have criminal practice?

A. I have had.

Q. Do you know anything about the practice in other counties than your own?

A. Some of the adjoining counties.

Q. What?

A. Erie, Venango, and possibly Mercer.

Q. You have practiced in those counties?

A. Erie and Venango.

Q. Are you familiar with the established modes of criminal procedure in those counties?

A. I think so.

Mr. Wallace: Do you want to cross examine?

Mr. Estep: Yes.

Mr. Estep:

Q. In Erie County, do you know what cases have been tirred,—the homicide cases that have been tired in the last several years?

A. I can't name any of them, but I know a number of them. I defended two in Erie County.

[fol. 312] Q. Who was the District Attorney of Erie County at that time?

A. Pitt Gifford, the first time, and the last time Mr. Bloss.

Mr. Wallace:

Q. Are you familiar with the practice in these counties you have named, in the trial of homicide cases and in felony cases generally?

A. I think so.

Q. Will you state whether or not it is in accord with the established practice in the trial of homicide cases in those jurisdictions, that a man indicted in two separate and distinct indictments for two separate and distinct offenses, constituting different acts, to have both of those indictments tried at the same time before the same jury?

A. It is not.

Q. What is the general rule in regard to major felonies?

A. Tried separately.

Q. Each separate offense?

A. Always.

Q. Have you ever known any variation from that, except in the matters specifically provided for by statute?

A. Never.

Q. Will you state whether or not it is the established mode in criminal procedure, in the trial of any homicide cases in the jurisdictions you have named, when a prisoner has been arraigned on a single indictment and has pleaded Not Guilty, and the Commonwealth has joined issue similiter, and the issue has been framed, that he immediately should be arraigned on another indictment charging a separate offense, and the two tried together before the same jury?

A. It is not our practice. I never heard of it.

Q. State whether you regard that as contrary to the established mode of procedure.

A. It is, absolutely.

Q. Will you state whether or not it is the established practice that in homicide cases, the prisoner should have twenty peremptory challenges on each indictment.

A. I never heard it questioned.

Q. Will you state whether or not it is the established mode of criminal procedure, in the jurisdictions you have named, in the trial of homicide cases, that evidence should be excluded as to other crimes charged?

A. Never any evidence of any other admitted. I might modify that by saying that where the defendant takes the stand, there has been a recent ruling that permits a record of former conviction to be offered for the sole purpose of attacking the credibility of the defendant.

Q. That would only be by way of rebuttal, however?

A. That's all.

[fol. 313] Q. It would not be admissible in the Commonwealth's case in chief?

A. Absolutely not. I think that is a vicious decision.

(No cross-examination.)

[fol. 314] GEORGE W. MUSE, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. Where do you reside?

A. New Castle, Pa.

Q. You are a member of the bar of Lawrence County?
A. I am.
Q. How long have you been a member of the bar?
A. It was admitted in 1896. Twenty-eight years.
Q. You have practiced law continuously for twenty-eight years?
A. All but ten years that I was in Harrisburg, about thirteen years ago.
Q. You are a member of the bar of other courts in the state?
A. Yes.
Q. Have you ever held any public office?
A. Yes.
Q. What?
A. District Attorney of Lawrence County between 1918 and 1921.
Q. Have you had considerable experience in criminal law?
A. I have.
Q. And practice?
A. In the last thirteen years, yes.
Q. Are you familiar with the established mode of criminal procedure in your county?
A. I think so.
Q. In any other counties?
A. I would rather limit that to Lawrence County. I have had some slight experience in Mercer County. I have tried some cases there.
Q. Are you familar with the established mode of procedure in the trial of homicide cases and in felonies generally, in your county?
A. I think so, yes.

Mr. Wallace: Do you wish to cross examine?
Mr. Estep: Yes.

Mr. Estep:

Q. During the time that you were District Attorney of Lawrence County, did you have occasion to prosecute any murder case?
A. Yes, sir.
[fol. 315] Q. How many?

A. I wouldn't know exactly, but about seventeen or eighteen or nineteen.

Q. Were any of those cases such cases as the defendant having two separate indictments for homicide against him?

A. There were no cases where there were two separate indictments for homicide, but there was one case where three men had indictments for murder, and also indictments for robbery and felonious assault and battery on another person, at the same time than the one who was killed, which would be practically similar, so far as practice is concerned.

Q. In other words the three men were indicted for the murder of one person?

A. Yes, sir.

Q. And for robbery in connection with another person?

A. At the same time.

Q. Were they tried together for the murder?

A. No, they were tried separately. They were tried separately as defendants, in the same indictment, upon motion by the attorneys for a severance, but the District Attorney saw to it that he would not try the robbery case *the* the felonious assault and battery case at the same time that he would try any of those murder cases.

Q. You knew you couldn't do that, the District Attorney had no discretion in that matter? You knew that?

A. Yes. That is what I am trying to say.

Q. And the reason they had separate trials in the homicide case, was because the attorneys for the defendant objected to a trial of all of them, and asked for a severance?

A. I don't know that they objected, but they asked for a severance.

Q. Do you know of any case in Lawrence County, where a man was indicted in two separate indictments for homicide?

A. No, I don't, except what I referred to, but that wasn't homicide.

Q. I am talking about where one defendant has several indictments against him. Then you never knew that question to even come up in the courts of Lawrence County, for the purpose of being decided?

A. I never heard of it.

Mr. Estep: Then the witness' testimony is objected to because, having only testified as to his knowledge of the

practice and procedure in Lawrence County, he would not be competent to cover Allegheny County and the rest of the State of Pennsylvania. And further, this matter never having come before the Courts of Lawrence County and to the knowledge of the witness, he is not qualified to testify as to what the practice and procedure in Lawrence County is on that particular issue.

The Court: As I understand, the witness himself has [fol. 316] limited his knowledge as to the Criminal practice in the county with which he is familiar, Lawrence County, and would not undertake to speak of the general practice over the State. From his entire testimony, I think he has qualified himself to speak in a general way, as to the practice in Lawrence County. The objection is overruled, and an exception noted to the respondents.

Mr. Wallace:

Q. Will you state whether or not it is in accordance with the established mode of criminal procedure in Lawrence County, that a prisoner charged under two separate indictments for two separate and distinct homocides, should be tried upon both of those indictments at the same time before the same jury?

A. No, sir. If I were District Attorney, I wouldn't risk trying it.

Mr. Estep: That is objected to as not being responsive.

Mr. Wallace:

Q. State whether or not that same rule applies to other major felonies?

A. Yes. except statutory exceptions.

Q. Except as limited by statute?

A. Yes.

Q. If I understand you, that rule applies to all major felonies, except those in which the statute makes an exception. Is that correct?

A. Yes.

Q. Will you state whether or not it is in accordance with the established mode of criminal procedure in your county, that where a prisoner is arraigned on an indictment charging murder, and pleads Not Guilty, and the Commonwealth

joins with a similiter issue framed, that he should be arrai*n*ged on another similar indictment, an issue framed in the same way, and the two cases then tried at the same time, before the same jury?

A. That would not be the practice.

Q. State whether or not it is the established mode of procedure in the trial of criminal cases in your county, that a prisoner should have his full quota of peremptory challenges, in each indictment, under which he may be charged?

A. *U*es.

Q. State whether or not it is the established mode of criminal procedure in your county, that in the trial of homocide cases, evidence should be admitted in regard to other crimes charged?

A. Well, only as to exceptions in the Act of 1911, when he goes into defense on character witnesses, and also in rebuttal, as the witness just before testified.

Q. Except for those two exceptions, it would not be admissible?

[fol. 317] A. No. There may be exceptions to that. In the case of adultery, you can sometimes show adulterous practices, but those come under exceptions.

Q. The general rule is as you have stated it.

A. Yes.

Mr. Wallace: Do you want to cross examine?

Mr. Estep: That is all.

A. M. Graham, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. Where do you reside?

A. New Castle, Lawrence County?

—. ——

A. Yes, sir.

Q. How long have you been a member of the bar of Lawrence County?

A. Since September, 1897.

Q. Have you practiced law continuously during that period of time?

A. Yes sir.

Q. Are you a member of the Courts of Appeal and the Federal Courts?

A. Yes.

Q. Are you familiar with the established modes of procedure in criminal cases, in your county?

A. I would say I am, and the adjoining counties in which I have practiced.

Q. What are the counties?

A. Erie, Crawford, Venango and Mercer, Butler, Beaver, and slightly in Allegheny.

Q. Have you ever had any public office?

A. No, sir.

Q. Have you had a large criminal practice during this time?

A. Reasonably large.

Q. Are you familiar with the established modes of criminal procedure in the jurisdictions you have named?

A. As a general principle, yes.

Q. Are you familiar with the practice in homocide cases?

A. Yes, sir.

Q. And in felonies, generally?

A. Yes, sir.

[fol. 318] Mr. Wallace: Do you wish to cross examine?

Mr. Estep: Yes, sir.

Mr. Estep:

Q. Have you ever tried any murder cases in the counties you have named?

A. Yes, sir.

Q. Which ones?

A. Mercer. Also associate counsel in a murder case in Erie.

Q. The other counties you have named, you have never——

A. In Butler I have also been associated in a case. I didn't try the case. I was associated in the trial of the case.

Mr. Wallace:

Q. Did you ever try cases in your own county?
A. Yes.

Mr. Estep:

Q. Was there any question involved in the procedure of any of the cases you tried, wherein the defendant was indicted on more than one charge of homocide?
A. One case in our county the question came up.
Q. That is the only case?
A. And also the case that Mr. Muse spoke of. While I wasn't in that case directly, I was associated in that case?
Q. That is, where three men were defendants?
A. Yes. One case in Lawrence County.
Q. Was that a case where the defendant was charged with——
A. With killing two persons.
Q. What was done in that case?
A. There was a severance.
Q. Were you interested in that case?
A. Yes, sir. Mr law partner tried the case, but while my law partner tried the case, I briefed the case.
Q. Was that severance brought about by reason of an objection by you or your law partner as to a trial on both indictments?
A. I think it was requested and granted, although it has always been the practice there. I don't think the District Attorney would dare to try two cases at one time.

Mr. Wallace:

Q. Will you state whether or not in the jurisdictions you have named, in homocide cases, it is the established mode of procedure in criminal trials, in homocide cases, to try a prisoner on two separate indictments charging two [fol. 319] separate and distinct acts of murder, before the same jury at the same time?
A. It is not the practice.
Q. Will you state whether or not it is the practice in the jurisdictions you have named, where a prisoner has been arraigned on a single indictment for murder, has pleaded Not Guilty, the Commonwealth has joined issue with a

similiter, and an issue framed, that immediately he should be brought before the Court and arraigned on another murder indictment, an issue similiter framed, and the two cases tried together before the same jury?

A. That is not the practice.

Q. What is the practice in regard to giving to a prisoner twenty peremptory challenges upon each indictment, for each separate and distinct act?

A. That is the statute of Pennsylvania.

Q. And is that the practice?

A. Yes.

Q. What is the practice in the trial of homicide cases, as to admitting evidence offered in chief by the Commonwealth, in regard to other crimes charged?

A. That is not the practice under the Act of 1911 and the Act of 1917 which was an amendment, except one exception, I think, which permits it to be offered under the statute, where the defendant offers evidence of good character.

Q. That would only be by way of rebuttal?

A. Yes, and also where he goes on the stand, and he may be asked if he has not been convicted of crime at another place, for the purpose of affecting his credibility.

Q. Such evidence would not be admitted in the case in chief?

A. Never.

[fol. 320] Monday, December 1, 1924.

Afternoon Session

JAMES A. WAKEFIELD, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are a member of the Allegheny County bar?

A. Yes, sir.

Q. And of the Courts of Appeal and the Federal Courts?

A. And the United States Supreme Court.

Q. How long have you practiced law?

A. It will soon be thirty-five years.

Q. In Allegheny County all the time?

A. Yes.

Q. Have you had expereince in the practice of criminal law?

A. Some.

Q. During that entire period of time?

A. Yes; less within the last two or three years.

Q. Were you ever in the District Attorney's office in any capacity?

A. I was an underling under Richard H. Johnston for a limited length of time, many years ago.

Q. As what?

A. An assistant.

Q. Are you familiar with the established forms of criminal procedure in Allegheny County?

A. I am, I think.

Mr. Estep: I object to any question asked this witness on the basis of his knowledge of procedure. It is a question here whether it is the law of Pennsylvania.

The Court: If this were purely a question of statutory construction, or as to what the common law was, that also would be a matter for the Court, but it is an additional offer of proof that the statutory law or common law is in harmony with the general practice in the State of Pennsylvania. For this purpose I have admitted the evidence, and the objection is overuled and an exception noted to respondents.

Mr. Estep: Do we understand that that ruling of the [fol. 321] Court only applied to the statutory law, and excluded the decisions of the Supreme Court of the State?

The Court: No, certainly not. As interpreted, of course, by the Supreme Court of the State.

Mr. Wallace:

Q. Are you familiar with the established modes of criminal procedure in the trial of homicide cases?

A. I think so, in——

Q. In the trial of felonies generally?

A. Yes.

Q. Will you state whether or not in the County of Allegheny it is in accordance with the established forms or modes of procedure, where a prisoner is indicted under two separate indictments for two separate and distinct acts of alleged homicide, that he should be tried on both of those indictments at the same time, before the same jury?

A. The practice is not to do it.

Q. Will you state whether or not it is in accordance with the established forms of criminal procedure in Allegheny County, when a prisoner has been arraigned on a homocide indictment, has pleaded Not Guilty, the Commonwealth has pleaded similiter and issue has been joined, that immediately he should be arraigned on another homocide indictment, a similar issue so framed, and the trial proceeded with before the same jury on those two indictments?

A. It is not the practice. I never knew of it being done until this case.

Q. Do you know what the practice is in regard to whether a man who is charged with homocide, has twenty peremptory challenges in each case?

A. The statute provides for it, and the practice is to give him twenty challenges.

Q. What is the practice in regard to admitting evidence in the trial of a homocide indictment, relating to some other homocide or other crime charged?

A. Anything else is not allowable, unless of course, there are exceptions to that, where a man would undertake to establish reputation, or something of that kind, and opened the door in his defense.

Q. What is the practice in the case in chief, as to permitting such evidence?

A. It is not permissible in chief. It is only in rebuttal.

Cross-examination.

Mr. Estep:

Q. Do you remember the cases tried in Allegheny County not so long ago, called the "penitentiary cases"?

A. Yes.

[fol. 322] Q. Wherein there was a riot in the penitentiary, and two or three men killed?

A. Yes.

Q. Do you know that four defendants in that case, each had separate indictments, but at the same time each was tried on two separate indictments, charging them with the killing of two separate persons in the penitentiary in the course of that riot?

A. I did not know that.

Q. Did you know that in the case of Commonwealth vs. Brown, the defendant was tried for killing a police officer of the City of Pittsburgh, and also another young man, this *bring* in the course of the perpetration of a burglary out on Fifth Avenue, and that that was tried in this county under those facts and in that procedure?

A. I know the Brown case, and know the decision as written by the Supreme Court.

Q. One of the cases I refer to was the Orlosky case, found guilty of murder in the first degree. The other was known as "Battle Axe," another man by the name of Yandas, and another man——

A. Those are the penitentiary cases?

Q. Yes.

A. I only know of those generally. I have not kept track the last two or three years as I did formerly. I did not know that they had two indictments against them and tried together.

Q. Do you recall the Henry Klinger case, where the man was indicted on the charge of involuntary manslaughter, with the right under the law, of twenty challenges, where he was charged with the killing of some forty people who were riding on a streetcar going through the street car tunnel on the South Hills, on December 24th, 1917?

A. I remember that case.

Q. And that he was tried on four separate indictments in that case, and found guilty on three out of the four, and sentenced?

A. I did not know that.

Q. If those facts are true as I have given you the number of cases, then the practice and procedure in Allegheny County is not as you have testified to?

A. The practice and procedure that I am testifying to is the practice and procedure that I have known. I had never known of any major felony to be united together, for instance, if a man were to burgle your house and he were

to burgle my house, and he would be indicted in each case, they would not be tried together.

Q. But that isn't the question at issue here.

A. No, but it is an illustration.

Q. Then you are only speaking from your own experience and your own personal knowledge of what has been done, not as to the practice generally in the county?

[fol. 323] A. My observation, which would form my conception of the practice.

Mr. Wallace:

Q. If I understand, your testimony applies to the practice up to within the last two or three years?

A. Three or four years. I have not kept up with the matter in that time.

Frank C. McGirr, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are a member of the bar of Allegheny County?

A. Yes sir.

Q. How long have you been a member of the bar?

A. Forty-four years.

Q. You are a member of the Courts of Appeal and of the Federal Courts?

A. Yes, sir.

Q. During the course of your practice, have you had considerable experience in criminal law?

A. I did the first ten years of my practice.

Q. Have you had any experience since then?

A. Yes. And my partner for a great many years was John Marron, one of the leading criminal lawyers at this bar. I frequently assisted him in the trial of those cases, and often prepared his cases for him.

Q. Are you familiar with the established modes of procedure in the trial of criminal cases in Allegheny County?

A. Yes, sir.

Q. Outside of the county, to any extent?

A. Yes. I think I have a general knowledge of the practice throughout the state, for I kept myself constantly informed of all decisions in every case I heard of that was in any way, or had any novel questions of any kind in it.

Q. You were president of the State Bar Association, I believe?

A. Yes.

Q. Are you still?

A. No.

Mr. Wallace: Do you want to cross examine?

[fol. 324] Mr. Estep: I object to this witness, the same objection that I made against all of them, that any testimony they offer is irrelevant, incompetent and immaterial; and further, that the witness is not qualified to pass upon a question of law in the State of Pennsylvania, in connection with this case.

The Court: For the reasons heretofore given, the objection is overruled and an exception is noted in favor of the respondents.

Mr. Wallace:

Q. Will you state whether or not it is in accord with the established modes of criminal procedure in this county, when a prisoner is indicted on two separate homocide indictments, on two separate and distinct acts of alleged homocide, that he should be tried on those two indictments at the same time before the same jury?

A. No, sir, it is not, and the reasons are very plain, and have been asserted by the courts, and that is, that it would not only confuse the defendant in the preparation of his trial——

Mr. Estep: Objected to. This is a question as to the witness' knowledge.

The Court: He is giving the reasons for the practice that he says exists. I don't know of any objection to his giving the reasons upon which that alleged practice rests. He might give such a conclusive reason that we might be forced to conclude no such contrary custom could exist in reason. The objection is overruled and exception noted.

A. I was going to say the reasons are, that the defendant cannot properly prepare his defense; secondly, it is liable

to confuse the jury—almost sure to do so, and third, he is deprived of his number of challenges, that he would have if the cases were tried separately.

Mr. Wallace:

Q. Will you state whether or not it is the established mode of procedure in the trial of homocide cases in Allegheny County, where a prisoner has been arraigned on a single indictment, to which he pleads Not Guilty, and the Commonwealth joins issue with a similiter, and issue is framed, that he should be arraigned for another indictment, and an issue similarly framed, and the two cases then tried together before the same jury?

A. No, it is decidedly not the practice, and it is wrong entirely.

Q. What is the practice in Allegheny County in regard to allowing a prisoner twenty peremptory challenges under each homocide indictment for which he may be tried?

A. The practice is that he is entitled to twenty in each case.

Q. What is the practice in regard to permitting in the trial of a homocide indictment, evidence as to some other crime charged, particularly some other homocide?

[fol. 325] A. It is the rule that it cannot be admitted except in those cases which they call res gesta; for instance, I remember a case tried by Mr. Estep here, the McNierny case, in which a man was indicted for the killing of his wife and his child. There wasn't any effort made to try the two cases together, but Mr. Estep tried the McNierny man for the killing of his wife, and in that trial he showed that the man after shooting his wife, picked up the child and put her on the mother's body, and shot through the child into the mother. That is one of the cases we call a res gesta, where they permit evidence of that kind to go in, because it was all done at the same time, for the same motive, but in this case I understand there are two distinct homocides; one was a workman on a strike, and another was a policeman who was not in uniform. They couldn't be tried together and give a fair, honest and square trial to the man.

Q. Do you know of any practice anywhere else in the State of Pennsylvania, contrary to what you have testified to as the practice in Allegheny County?

A. No, I don't believe it has ever been done anywhere in Allegheny County. There have been two or three cases where no exceptions were taken, and the thing went through.

Cross-examination.

Mr. Estep:

Q. Calling your attention to the McNierny case, you have just testified to, do you recall as a fact that the counsel in that case asked for a severance of the case, asked the Court for a severance, and a severance was granted by the Court, because of that request on the part of counsel?

A. No, I don't think so. I was speaking to Mr. Laughlin, who defended that case, and he said there was nothing said about it.

Q. Don't you know it is a fact that, within the practice of Allegheny County, where there are simultaneous killings, such as existed in this case, and in the McNierny case and in the Brown case and a number of other cases, that have been tried in the courts of this county, that where the killing is simultaneously committed, unless there is a request by counsel and a demand by counsel for a severance, it is the practice to try them both before the same jury?

A. No. It is just the opposite. Those are exceptions to the practice.

Q. Have you ever heard of the Clodbody case, in Allegheny County?

A. Yes. Those are exceptions to the regular practice. I have noticed in the Criminal Court that a great many things you do up there are not according to law, and your idea is to convict the defendant, no matter how you do it.

Mr. Estep: I move that part of the statement be stricken [fol. 326] out, and that we confine ourselves to the law of Pennsylvania as written in the statute books and not by word of mouth of Mr. McGirr in court.

Mr. Estep:

Q. I was asking you if you ever heard of a certain case.

The Court: The witness has undertaken to give what he considers the uniform practice according to law, in the County of Allegheny. Certain apparently exceptional

cases have been suggested by the witness, and answers that they are exceptions to the rule, and not the rule. That part of his answer wherein he says that the practice of Allegheny County is not always in accordance with the law, I think I will not strike out. There was something followed that, that perhaps was not relevant, and that might be stricken out.

Mr. Estep:

Q. I ask you again if you ever heard of the Clodbody case, tried in Allegheny County?

A. Yes.

Q. Did you ever hear of the Paul Orlosky case?

A. No.

Q. Tried in Allegheny County, in front of Judge Quigley, of Center County?

A. I don't remember that.

Q. Did you ever hear of the Michael Norton case, tried in Allegheny County, by Judge Langham of Indiana County?

A. No.

Q. Did you ever hear of the Salvatore Battalia case, in Allegheny County?

A. What was that case? A first degree case?

Q. No, that was a second degree case.

A. I think I have heard of that one.

Q. And did you ever hear of the case of John Kearns, tried in Allegheny County in front of Judge McPherson, of Adams County?

A. Yes.

Q. Have you ever heard of the James Yandis case, tried in Allegheny County in front of Judge Reid, of Allegheny County?

A. Yes, I can recollect that.

Q. Did you ever hear of the case of Peter Moreno, tried in Allegheny County in front of Judge Carnahan?

A. Yes.

Q. Did you ever hear of the case of Batisto DeNino, tried in front of Judge Swearingen, in Allegheny County?

[fol. 327] A. No, I don't believe I have.

Q. Did you ever hear of the case of —— Santos, in Allegheny County?

A. Yes.

Q. Did you ever hear of the case of Herman Klinger, tried in Allegheny County, in front of Judge Swearingen of this county?

A. Yes.

Q. Did you ever hear of the case of Samuel Palozzo, in front of Judge Swearingen, of this county?

A. Yes. Those were not similar cases to this one.

Q. They are all cases where the defendant was indicted on two homocides, and was tried before one jury on both indictments?

A. I don't think that is the case.

Q. Did you ever hear of the case of D. J. Riley, tried in Allegheny County in front of Judge Quigley, of Center County?

A. Yes.

Q. Having heard of all those cases, would you still say it wasn't the practice and procedure in Allegheny County to try a defendant where he is indicted on two separate homocides, on those two indictments before the same jury, where no objection is made by him or his counsel, or a severance asked for?

A. I would say yes, the practice is entirely different. Those cases were improperly tried, and that neither the counsel nor the defendant is compelled to ask for a severance. It is the duty of the Judge to see that he gets a severance. It is his duty to explain to him his position, to see that he is not tried on two separate, distinct indictments, before the same jury. I don't think a prisoner could waive it, and under the law he is not bound to. It appears on this record that nothing was done, and nothing appears at all except that they went on and tried it. It was not only a mistrial, but——

Q. How do you know about the record of this case?

A. Everybody in this county knows about it.

Q. Have you ever read the record?

A. Not the whole testimony through.

Q. Do you know whether or not Mr. Ammon did make an objection to——

A. No, but I heard the record offered here, and there was no objection.

Q. There was no objection from Mr. Ammon there?

A. No, there was no exception one way or the other.

Mr. Wallace: This witness was not examined on this particular record.

A. Nothing appears on the record one way or the other.

[fol. 328] FRANKLIN A. AMMON, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are the attorney who was appointed by the Court of Oyer and Terminer, to defend this Joseph Valotta?

A. Yes.

Q. You carried the case to the Supreme Court of Pennsylvania?

A. I did.

Q. Did you consider the question of an appeal to the Supreme Court of the United States?

A. I did.

Q. Did you make any investigation as to the costs of such an appeal?

A. I did.

Q. What did you do?

Mr. Estep: Objected to for the reason that the procedure is laid down by the law of the United States, and the decision by the Supreme Court of the United States. The mere fact that at this late hour a witness undertakes to give some reason why an appeal was not taken to the Supreme Court of the United States, when that was the proper procedure, is incompetent, irrelevant and immaterial, and is objected to for that reason.

The Court: I will hear the testimony. The objection is overruled and an exception noted to respondents.

(Question read.)

A. I consulted with Pier Dannals, our Prothonotary, and obtained the name of the Prothonotary of the Supreme Court.

Q. Pier Dannals is the Prothonotary of the Supreme Court of Pennsylvania?

A. Yes. I had Mr. Dannals fully instruct me as to the details of such an appeal, and according to the best of my calculation, before the appeal would have been heard at Washington, by the Supreme Court of the United States, for the printing and incidental expenses I figured on at least $1,200.

Mr. Wallace:

Q. Did you communicate that to Joseph Valotta?

A. I did not.

Q. Where was he at the time?

A. I believe he was in the death house in Center County. [fol. 329] Q. Did you make any effort to see whether or not those funds could be raised?

A. Yes. I talked to one or two philanthropic gentlemen about the matter, but wasn't able to obtain such an amount of money.

Q. Do you know whether or not Valotta had any money?

A. No, he had none at all; absolutely penniless.

Q. Will you state whether or not it was impossible for you, as counsel, to take an appeal here, on account of the poverty of the defendant?

A. Well, I probably might have spent it out of my own pocket, but I felt I couldn't afford it.

Q. I mean outside of that, there was no available funds to take this appeal?

A. No.

Cross-examination.

Mr. Estep:

Q. Have you found out yet as to what the cost would have been, the real cost?

A. I am testifying to what I had figured up the real cost would be.

Q. That was your own calculation. Have you ever tried to verify that calculation?

A. Not any more than my consultation with Mr. Dannals, and from the information I got from him, it seemed that there had to be an immense amount of money. The whole

records had to be printed, and there were very many other details of printing that would have run to at least a thousand dollars.

Q. You know that in Allegheny County, when an appeal is taken to the Supreme Court, where counsel is appointed by the Court, the bill for printing is paid by the County, upon petition by counsel?

A. Yes, sir, I do.

Q. Did you at any time after you discovered what the cost of printing would be, present a petition to the Court of Allegheny County asking leave to appeal, and asking for an order to pay for your printing of the appeal to the United States Supreme Court?

A. I did not, for the reason that, I think it is the Act of 1913 or 1915, doesn't provide for any appeal—there is no provision for an appeal to the Supreme Court of the United State, if my reading of that Act is correct, which I think it is.

Q. If the thing was so pressing, why did you wait until July 19, 1924, or two days before the date set for the electrocution of Joseph Valotta, before you applied to this Court for a habeas corpus, having permitted six months or more to elapse?

A. As you probably are aware, the Board of Pardons had taken this case under re-advisement, and we got an addi- [fol. 330] tional order to the one we had originally. I was pinning my faith on the humanity of the members of the Board of Pardons, and it was only after all hope of clemency from the Board of Pardons at Harrisburg was lost by me, that I began to cast about for other means, and when I was finally assured that the Board of Pardons would not grant any clemency at all, and were insisting on doing this, that I immediately labored on a petition for a writ of habeas corpus.

Q. Have you or Mr. Wallace, or anybody connected with this case on behalf of Joseph Valotta, been able to raise the funds since, in the interest of your writ of habeas corpus, rather than the writ of error that you had in mind?

Mr. Wallace: Objected to as not cross examination.

By the Court: We do not see its relevancy.

Mr. Wallace:

Q. I show you Exhibit No. 3, which purports to be the appellee's paper book in the case of the appeal to the Supreme Court of Joseph Valotta, and Exhibit No. 4, which purports to be the brief for the appellant in said appeal, and ask you whether or not those are true and correct copies of those two books?

A. Yes.

Exhibits Nos. 3 and 4 offered in evidence by Mr. Wallace.

R. P. MARSHALL, having been duly sworn, testified as follows:

Direct examination.

Mr. Wallace:

Q. You are a member of the bar of Allegheny County?

A. Yes, sir.

Q. And have been for how long?

A. Thirty-two years.

Q. Have you had considerable practice in criminal cases?

A. I did up until the last four or five years.

Q. Prior to the last four or five years, did you have a large criminal practice?

A. I had considerable criminal practice.

Q. Have you had some since?

A. Some.

[fol. 331] Q. Are you familiar with the established modes of procedure in criminal cases in Allegheny County?

A. Well, I would say I was very familiar with it up until the last few years, from 1892 down until 1916 or '17 or '18, and even before 1892 I was very familiar with the practice.

Q. Are you familiar with the established mode of procedure in the trial of homocide and other felony cases?

A. I would say up until 1916 or 1917, or 1918, I was. Whether there has been any change in the practice in that court since, I don't know. And prior to 1892 too; I would say from 1888.

Q. Will you state whether or not within the period that you have testified to, it was in accordance with the estab-

lished mode of criminal procedure in Allegheny County, that a prisoner indicted on two separate hom-cide indictments for two separate and distinct acts, should be tried upon them before the same jury at the same time?

A. I never knew of such a case, prior to the time I stated. My attention has been called to one case that has occurred since that, outside of the present case.

Q. Would you say it was contrary to the practice during that period of your familiarity?

A. I would say it was.

Q. Would you state also within the same limitations of time, whether or not it was the practice and established mode of criminal procedure in Allegheny County, when a prisoner was arraigned on a single homocide indictment and pleaded Not Guilty, the Commonwealth pleaded similiter, and issue joined, that he should be arraigned on another homocide indictment for a separate and distinct act, issue joined in the same way, and the two cases then tried together before the same jury?

A. I never heard of that being done.

Q. Would you say that was contrary to the established practice?

A. I never heard of it being done in all the time I ever heard. I never heard of a man being tried for two homocides at one time, until my attention was called to one case that has occurred recently, outside of this case, in the last three or four years.

Q. What do you understand the practice to be? Is it the established practice that a man should have twenty peremptory challenges for each homocide indictment upon which he is tried?

A. Not knowing of any case where a man was tried for two, I don't know what that would be, because I never knew of one being tried for two homocides at the one time.

Q. Is it in accordance with the established mode of criminal procedure in Allegheny County, that in the trial of an indictment in a homocide case, that evidence should be offered in regard to some other homocide, a separate and distinct act?

A. Not unless the homocides are so closely connected that you couldn't prove one without proving the other. The rule, as I understand it to be, being that where you cannot prove a separate crime against the defendant unless

the two crimes are so closely linked that, in order to prove the one you have to prove the other.

Q. In any other case, it would not be admissible?

[fol. 332] A. That is my understanding of the law. However, that point is up before the Supreme Court at the present time.

Q. So far as you know, has there been a practice in any other jurisdiction of Pennsylvania, contrary to that you have testified to?

A. I don't know anything about the practice in other counties.

Cross-examination.

Mr. Estep:

Q. You say that you have no knowledge of certain indictments being tried together. That is, of course, based on your own experience in the criminal court, in cases that you have yourself had some dealings with?

A. Yes, and up until I would say 1916, I was quite familiar with nearly all the cases that were tried in Criminal Court; that is, I mean all murder cases. I wouldn't say all cases.

Joeph Valotta, defendant, recalled, testified as follows:

Direct examination.

Mr. Wallace:

Q. When you were arrested in this case, did you have any money?

A. No.

Q. Did you get any after that?

Mr. Estep: Objected to as being immaterial, irrelevant and incompetent, having nothing to do with the question at issue as to whether this habeas corpus is well taken or not.

The Court: We will hear the testimony. The objection is overruled, and an exception noted to respondents.

Q. Where would I get it? I was in jail.

Mr. Wallace:

Q. You didn't have any up to the time that an appeal might be taken to the Supreme Court of the United States?
A. Yes.

(No cross-examination.)

Petitioner rests.

[fol. 333] RESPONDENT'S CASE

SAMUEL H. GARDNER, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. You are the District Attorney for Allegheny County?
A. I am.
Q. How long have you been District Attorney for Allegheny County?
A. Since the 18th of December, 1922.
Q. And you were connected with the District Attorney's office prior to that date?
A. For practically five years I was Assistant District Attorney, so I have been in the office for almost seven years.
Q. During your period of service in the District Attorney's office both as Assistant District Attorney and as District Attorney, have you a knowledge as to the number of murder cases that have been tried in this county during that period of time?
A. I cannot give the exact number, but I should say approximately 500 murder cases during this seven years. I think an average of a little over seventy murder cases a year.
Q. Have you any figures which would indicate about how many murder cases you tried during that period of time?
A. I have tried, I think, about ninety-five cases, murder cases, individually. I am not certain as to the exact number, but it is between ninety and a hundred.
Q. Are you acquainted with the practice and procedure in the arraigning of defendants in the courts of Allegheny County, charged with homicide, where the defendant has

more than one indictment charging homicide against him, and the killing in both cases being a simultaneous killing?

A. Yes, sir, I have, where the killing is simultaneous or substantially so, the two killings occurring within a few minutes of each other.

Q. What is the practice and procedure?

A. It has been the practice ever since I have been in the District Attorney's office, that where there was no objection on the part of the defense, both murder cases under those circumstances were tried together, by one jury, tried at the same time. If there is any objection on the part of the defense, we treat it as a matter of right for him to object, but if — don't object we very frequently try them together, unless the Commonwealth felt it was better for their interests to try them separately.

Q. In that case, where there was no objection made by [fol. 334] the defendant, would the defendant be arraigned on both indictments at the same time?

A. The practice was to arr-ign the defendant on the one indictment; after his plea was entered on that indictment, immediately to ask him to stand up again, and arraign him on the other indictment, whereupon a jury was then selected.

Q. What has been the practice and procedure in so far as the number of challenges allowed by the Courts of Allegheny County is concerned, where a defendant was arraigned on two separate indictments in a homicide case?

A. I don't know that I can answer that definitely, because I don't recall any case that I have tried. Personally I have tried six cases that I recall, where a man who was tried on two indictments charging murder at the same time, and in none of those cases did that question arise, because the defendant in none of those cases exhausted his challenges. I do recall one case in which I exhausted my challenges, and I didn't raise the question, however, I just assumed I had no more challenges. I personally tried the case of Paul Orlonsky before the late Judge Quigley, of Center County. That was at 187 and 189 February Term, 1924. Also the case of Michael Norton, before Judge Langham, of Indiana County, at the same number and term; Salvatore Battalia, before Judge Evans, of this county, at the same number and term; John Kearns, before Judge McPherson, of Adams and Fulton Counties, at the same number and term, and James Yandas, before Judge Reid,

of this County, at the same number and term. I might explain that these were cases where these five men were jointly indicted for the killing of two different men. In other words, they were joint indictments, charging two murders. Now, there was a severance in those cases as to individuals. They were tried separately, but a consolidation of the two indictments against those individuals. Then I also tried the case of Commonwealth vs. Batisto DeNino, at Nos. 17 and 19 September Sessions, 1921, before his Honor, Judge Swearingen. I am not positive, but I think Mr. Ammon was counsel for the defendants in those cases. It happened up in the hill district. I also know of a number of other cases that have been tried by other Assistant District Attorneys. Mr. Estep has had two or three. Mr. Park has had at least one, the case of Clodbody. The Santos case is No. 44 and 46 November Term, 1921, before Judge Swearingen. Also the case of D. J. Riley at 103 and 105 February Sessions, 1922, before Judge Swearingen. Also the case of Palozzo, 31 and 32 April Sessions, 1922, before Judge Swearingen. In the case of Clodbody, I cannot give you the number and term, I didn't have time to look up the number and term. I can get it for you, however.

Then the case of Peter Merino, at 24 and 26 November Sessions, 1923, before Judge Carnahan, tried by Mr. Estep, I believe.

Q. Speaking as to the practice and procedure in Allegheny County, I will ask you whether or not the practice and procedure doesn't provide that, where a defendant is indicted under several indictments, two indictments charging homicide, the practice is to try them together unless there is an objection on the part of the defendant or his counsel?

A. That is positively the practice during my experience in the District Attorney's office.

[fol. 335] Cross-examination.

Mr. Wallace:

Q. As I understand you, your testimony is that in such cases the prisoner has a right to be tried separately on each indictment?

A. That is my understanding of the practice.

Q. And that he has been tried jointly on each indictment, only where no objection was raised?

A. That is the idea.

Q. In how many of these cases which you have cited, was the prisoner without counsel?

A. In none of them. We never try a man without counsel.

Q. In how many of these cases was counsel appointed by the Court?

A. I couldn't answer that off hand, but I know in some of the cases they were defended by what we consider the best criminal lawyers in Allegheny County.

Q. I am asking you whether or not counsel was appointed by the Court. Do you? Isn't it a fact——

A. I couldn't answer that, because I don't recall off hand. Sometimes I don't even know which ones are appointed by the Court.

Q. These first five here, are those so-called penitentiary cases?

A. Yes.

Q. Don't you know that counsel was appointed by the Court?

A. Yes; very good counsel too.

Q. How about the other cases? Would you say that counsel was not appointed by the Court in the other cases?

A. No. I wouldn't so state. I think in that DeNino case, for one, counsel was employed in that case.

Q. That might be so?

A. Yes, I wouldn't say as to any of those except the penitentiary cases. In one of those penitentiary cases counsel was engaged by the defendant, the James Yandas case.

Q. In these penitentiary cases, those first five you referred to, what were the verdicts?

Mr. Estep: Objected to as being incompetent, irrelevant and immaterial.

The Court: Perhaps it is immaterial.

[fol. 336] A. It was first degree in the one case in both indictments, and second degree in two of the other cases, and Not Guilty in the other two on both indictments.

Mr. Wallace:

Q. There was no appeal in any of those cases?

A. There is a motion for a new trial pending in one.

Q. But none of these cases that you have referred to, got to the Supreme Court?

A. No. But the other cases that I have cited got to the Supreme Court and were affirmed. We consider the law well established.

Q. In the trial of these you have cited, that you say you used up twenty challenges and then stopped, was there any ruling as to whether or not you had any more?

A. No. I didn't raise the question. I exhausted my challenges when there were eleven men in the box, and I just stopped then. I didn't ask the Court to allow me any more.

Q. Was the question of the right to twenty challenges raised in any of these cases?

A. No.

Q. In any of these cases was there a motion made for a consolidation of the cases?

A. No.

Q. That is not the practice?

A. That is not the practice.

Q. In any of these cases, did the Court advise the defendant as to his rights, and consider whether or not he would be affected by a joint trial?

A. He didn't, because the prisoner had competent counsel in each case.

Q. In other words, if I correctly understand you, the cases you referred to, you rested the validity of the procedure solely on the fact that you undertook to try these cases together, and there was no objection?

A. That, together with the rulings of the Supreme Court of Pennsylvania, on that subject, I might say further that the counsel for the defendants in those penitentiary cases in particular, talked the matter over with me and they considered it was to their advantage to try them together, because they said "If we get a first degree in one of them, that is as bad as we could get. If we get an acquittal in one of them, or a second degree, we still stand the chance of getting a higher degree with another jury." I think it usually does work out that way. I would rather take the chance with one jury than with two, myself, if there was a case against me.

[fol. 337] HARRY H. ROWAND, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. Your name is Harry H. Rowand?

A. Yes, sir.

Q. You are one of the Court of Common Pleas Judges of Allegheny County?

A. Yes, sir.

Q. How long have you been a Common Pleas Judge?

A. Since December, 1922, I believe.

Q. And prior to your elevation to the Judgeship, were you connected with the District Attorney's office of this county?

A. I was District Attorney for—I was elected in the fall of 1917.

Q. And served up to the time you went on the bench?

A. Yes. Prior to that I served as Assistant District Attorney, taking out the four years of Mr. Jackson's administration. In other words, I served during the administrations of Goehring and Blakely.

Q. What was the first year you went into the District Attorney's office as assistant?

A. 1909, or some place around there. I have forgotten when Mr. Goehring came in.

Q. If you were out of the office four years prior to your being elected District Attorney, you would serve seven years prior to that time. That would make it about 1907?

A. I left there in December, 1913, and had been there seven years previous to that. I think Mr. Jackson was elected in the fall of 1913 and took office on the first Monday of 1914, and I served seven years immediately before that.

Q. In your capacity as Assistant District Attorney of Allegheny County, and Judge of the Common Pleas Court, and sometimes assigned to the Court of Oyer and Terminer and General Jail Delivery of Allegheny County, are you acquainted with the practice and procedure governing the arr-ignment of homocide cases, wherein the defendant is indicted on two separate indictments for homocide, and the killings are simultaneous?

A. Yes, I have had some experience in that.

Q. What is the practice in the Courts of Oyer and Terminer of this County?

A. My knowledge of it is that we always try them at one and the same time, where the killings happened at one and the same time, the same testimony.

Q. I will a*ks* you if there was a defendant indicted for killing two men, separate indictments, and the testimony adduced in one indictment would be applicable in the trial of the other, would those indictments be joined and the trial proceed before one jury?

[fol. 338] A. They would, if there were no objection made on the part of the defendant or his counsel.

Q. Have you knowledge of cases in Allegheny County, that have been tried under that procedure?

A. Yes. I have a recollection of cases being tried that way. There was one tried, as I recollect, of a Priest over on the South Side, who killed two parties. I can't give you the name of the man nor of the parties. Then there was another case tried, in the Elfred saloon or wholesale house I think out in Oakland, where a colored man I think by the name of Brown shot a policeman, and young Elfred. In that case the verdict was murder in the first degree as to the one, and second as to the other. I think in the case of the Priest, it was second degree.

Q. In sitting as a Judge in the Court of Oyer and Terminer of Allegheny County, during the time you have been on the bench, has that been the practice and procedure, so far as you know?

A. As far as I know, it has. I think we have had cases of that kind very recently over there, the penitentiary cases as we call them.

Q. I will ask you whether they are arraigned on the two indictments, where the killing is simultaneous, what is the procedure and practice as to the number of challenges allowed the defendant, he having been arraigned on two separate indictments and to be tried before one jury, the same jury?

A. The procedure is just the same as if it was one case.

Q. That would be twenty challenges?

A. Yes, twenty challenges.

Cross-examination.

Mr. Wallace:

Q. Do you know of any case where the defense objected to the trial of the two cases before one jury?

A. I wouldn't want to say that positively yes or no, but it runs in my mind there has been a case there at one time. I have an indistinct recollection that there was an attorney at one time objected to that, and he was granted a severance.

Q. The District Attorney has testified that the practice is recognized as the right of the defendant in such case to object to a consolidation for the purpose of trial, and that the right is always recognized when the objection is raised. Does that agree with your view?

A. Yes.

Q. So that I correctly understand you, if two cases, two indictments charging a simultaneous crime, two indictments each charging a crime occurring simultaneously, are tried before the Court, and the defendant objects to having that tried jointly, that objection is always sustained?

A. No. That is, for a homocide——

Q. I am speaking of a homocide case.

[fol. 339] A. I don't know as I ever heard of that, objection being made, but I am not sure enough to say whether that was.

Q. So you are not clear about that, if I understand you?

A. No, I am not clear about that particular case.

Q. And if I correctly understand you, there have been cases where two such indictments have been brought before you, or before the Court for trial, and no objection being made the case went on through?

A. Yes.

Q. And under such circumstances, the Court says nothing about if if nobody else says nothing about it. Is that correct?

A. Where the killing happened at one and the same time, the same facts, breaking into a building, for instance, just the same as any other Oyer and Terminer case, the same state of facts applicable to both cases.

Q. In such cases, of course, when the case is called for trial, the Court doesn't know what the case is about?

A. No.

Q. And the first knowledge the Court has that two separate indictments are before it, is on the several arr-ignments?

A. Yes.

Q. Now, under those circumstances, as I understand you, there have been cases where the Judges have just let the thing go along by default, if nobody else says anything about it?

Mr. Estep: Objected to for the reason that it is assuming a proposition that is not proven in this case, namely, that the Judges permitted it to go along by default.

The Court: It is an important matter; whether it is a question of right, or whether it is a question of waiver. It goes back to that. In other words, has the defendant a right to a separate trial, or has he not? If he has, then that would settle the question unless there is something in it that amounts to a waiver, and I suppose the State assumes that if a man makes no objection that he has waived. It must certainly be upon that ground that the right is based. I can conceive of no other.

Mr. Wallace:

Q. What I mean by the word "default," is that in the absence of any action on the part of counsel for the defendant, the Court takes no action, and the case just goes along. Is that what happens?

A. Yes, it does, but it is a question whether he would have the right to separate trials.

Q. I understood you to say that you agreed with the District Attorney, that he did have the right to raise the question?

[fol. 340] A. He can raise the question. I never went into the question whether he had the right. I know our courts have ruled on high grade crime of Oyer and Terminer, a robbery or something of that kind, or felonious assault and battery, where it all happened at one and the same time, he didn't have the right.

Q. We are not questioning that. I am speaking entirely of homocide cases. If I correctly understand you, this question of right is one you have never really considered?

A. It has never been questioned up there. It has been

done, and I suppose in a serious case like a homocide case, the Court may grant that, even though he didn't think he had the legal right to.

Q. But the abstract question or right, you have really never considered?

A. I don't remember the question ever being raised during my position in the District Attorney's office.

Mr. Estep:

Q. In the case where there are two defendants or more, who are jointly indicted, upon request of the defendant will a severance be granted, and a separate trial given to each of these several defendants?

A. Oh, yes.

Q. And if no request is made by the defendants, they can be and are tried together in the Courts of Allegheny County?

A. Yes, repeatedly.

Q. And have you knowledge that that has been done time and time again?

A. Oh, yes, repeatedly.

Mr. Wallace: This testimony is objected to for the reason that the statute expressly provides the procedure referred to, and we do not question it at all.

The Court: It is not raised at all. The one is a joint offense; the other is not.

JOHN C. HAYMAKER, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. You are a Judge of the Common Pleas Court of Allegheny County?

A. I am.

Q. How long have you been on the bench in this county?

A. About fifteen years.

Q. Prior to your elevation to the bench, did you hold the office of District Attorney?

A. I did.

[fol. 341] Q. How many years?

A. Nine years.

Q. Prior to your acting as District Attorney of the county, did you serve in the office of the District Attorney as assistant?

A. I did.

Q. How many years?

A. Six and half years.

Q. What was the interim between the time of your leaving the District Attorney's office and the time you went on the bench?

A. Two or three years.

Q. So that for a period of thirty years, except two years' interim, between leaving the District Attorney's office and going on the bench, you have been connected with the Courts of this County?

A. I have.

Q. Are you acquainted with the practice and procedure in the Court of Oyer and Terminer of this county, in connection with the arraignment of a defendant where he is charged with homocide in two separate indictments, the the facts to be proven being the same, as to whether or not a severance is a matter of right, or whether it is based upon a request of the defendant or defendant's counsel for such a severance?

A. I believe I am.

Q. Just tell us what is the procedure under those circumstances, and the practice.

A. I think the practice that has always obtained up there during my knowledge of the procedure, if the defendant has been arraigned on two or three separate indictments, if he does not elect to be tried upon one, and there is no objection upon the part of his counsel, he is invariably tried upon all of the indictments at one time.

Q. And that has been, to your knowledge, the procedure and practice during the period of time of your connection in the office?

A. That practice has obtained during my entire knowledge of the procedure in the Criminal Courts.

Q. And calling your attention particularly to a case where the same facts in the trial of both indictments, if they were severed, would be necessary in the trial of each indictment,

and no objection being made by counsel for the defendant, the Court and the District Attorney both, under the procedure and practice, would go ahead and try them together?

A. That would be the practice.

Q. Now, in connection with the trial of both indictments, or the several indictments, where no objection has been made and no request for severance made, what has been and what is the practice and procedure in so far as the number of challenges, peremptory challenges allowed the defendant, is concerned?

[fol. 342] A. The same as if he was tried on one indictment.

The Court:

Q. If two or three parties are indicted jointly, then presumptively they would be tried together, because the offense is treated as a joint offense, and the question of severance could only arise if it were raised by the defendant, who demanded a separate trial, in which case the Court would pass upon the question of the right of a severance?

A. That would be our practice.

Q. Now, when we come not to a joint indictment, but to two indictments, charging two separate offenses, against the same individual, would it be true or would it not be true, that presumptively the defendant has a legal right to a separate trial on each indictment?

A. There is no presumption on the subject, but if the counsel for the defense made the request, that he be tried separately, or on each indictment, the Court would allow him to be tried separately; or if his counsel raised that question, we would not question it at all.

Q. Aside from the question as to whether the offenses grow out of the same state of circumstances, if they did not grow out of the same circumstances, but were really two separate offense-, not immediately connected so that the facts of one would be res gesta of the other, in that case the city would not attempt to offer to try them both before the same jury, if they were separate and distinct offenses?

A. They would, if there was no objection.

Q. Would it be claimed by the State that there was any such thing as a right of the State to insist on a trial before the same jury for the two separate and distinct offenses?

A. What is your question?

Q. Take first the case where there are two indictments charging distinct felonies, not growing out of the same set of circumstances, is it not the absolute right of the defendant to have a separate and distinct trial, a separate trial on the two indictments, and is it a fact that the State would not think of endeavoring to try them both before the same jury?

A. No. The judge trying the case would simply take no initiative in the matter at all. He would wait to hear from the counsel for the deefndant. If the defendant *is* his counsel made no objection, the Court would permit the defendant to be tried on both indictments, although the facts were different in each case.

Q. Did you as District Attorney, ever offer to try two separate and distinct offenses, not connected closely in point of time and circumstances, before the same jury?

A. I don't remember. That is, I can't recall any case in which I ever did it.

[fol. 343] Q. In other words, that would certainly be very exceptional?

A. I don't know that you could call it an exception, because I know it has been done in a great many cases.

Q. Where the offenses were not even connected?

A. Where they are not connected. That is, I don't mean that there is a year or something like that between them, but where they are—well, half an hour or an hour, between the offenses, there isn't any question of our practice of trying both indictments.

Q. But if an objection were raised by defendant's counsel, that would end it, and you would have to submit them to two separate juries?

A. Yes.

Q. Now, that the case where the offenses charged in the separate indictments are somewhat closely connected. Is the right of the State to proceed, or the claimed right, based on an absolute right that they can insist upon it, or is it based on the assumption that the defendant by his silence, has waived it?

A. On the assumption that the defendant has waived it by keeping quiet, sitting still.

Q. But the right which he otherwise could have asserted, is assumed to be waived because he stays silent and doesn't object?

A. Yes. If he had raised the question, then we would dispose of it.

JOHN D. ROBB, having been duly sworn, testified as follows:

Direct examination.

Mr. Estep:

Q. You are a practicing attorney at the Allegheny County bar?

A. I am.

Q. How long have you been practicing?

A. Thirty-seven years.

Q. And you are actively and have been actively engaged in the practice of the various courts of the count-, including, I presume the Federal Court?

A. I have.

Q. Did you ever hold a public office under the County of Allegheny?

A. I was for twelve years First Assistant District Attorney of Allegheny County, nine years under Judge Harry Rowand, and three years under Major Stewart.

Q. After you left the District Attorney's office, having served as First Assistant, did you practice criminal law to any extent in this county?

[fol. 344] A. Rather considerably, yes, sir.

Q. Are you acquainted with the practice and the procedure in this county, with reference to homocide cases and the arraignment thereof in the Court of Oyer and Terminer?

A. I am.

Q. What is the practice and procedure in the case of trial of homocide cases, where there is one defendant, who is indicted on two or more killings, happening at approximately the same time, so that the same evidence would be necessary on the part of the Commonwealth in the trial of each of the indictments, if they were tried separately; what is the practice and procedure as to the consolidation of those indictments and the trial before a single jury, where no objection is raised by counsel for the defense, or by the defendant?

A. Arraign him on the several indictments, consolidate the indictments, and try them together, unless an objection is made by his counsel.

Q. And has that been your knowledge of the practice and procedure both as counsel for the Commonwealth, as Assistant District Attorney, and as counsel for the defendant, in your general practice of law?

A. Since the first Monday of January, 1883, when I became Court Clerk of the Criminal Court.

Q. What is the practice and procedure with reference to the number of peremptory challenges allowed to the defendant where the indictments are consolidated and he is arraigned *are consolidated and he is arraigned* and tried before the same jury for both or more indictments?

A. The same number, twenty, as though he had been tried on a single indictment, and four for cause shown.

Cross-examination.

Mr. Wallace:

Q. If I correctly understand you, in cases of this character, where the defendant objects, no question is raised about his right to object?

A. I beg your pardon. I didn't catch it.

Q. (Question read.)

A. No question that I ever heard of was raised about any one's right to object, nor have I ever heard anyone object where the killing was practically a simultaneous shooting.

Q. But in case there is an objection raised, it is recognized as an assertion of a right that the prisoner is entitled to?

A. If I were on the bench, I think I would recognize it, if it were raised, but not being on the bench and never having heard it raised, I only sort of absorb what has been done.

Q. So you have observed cases, as I understand you, where two indictments have been presented to one jury, for trial, and no objection being made, the Court allowed the case to go on?

A. Yes, sir.

Q. And that is the extent of your testimony?

A. I have had the same experience myself.

[fol. 345] Q. I mean the proposition is, as I understand you, that the trial of two indictments of this character, before one jury, has only happened in your observation and experience, where no objection has been raised?

A. Yes, sir. I might say that is correct. Nor do I ever remember of objection having been raised.

Q. So that you are not familiar with what the practice would be in case objection were raised?

A. The Judge has to decide that.

Q. I am speaking of the practice. As I understand you, you don't know what the practice would be if objection were raised?

A. No, I don't know what the practice would be if the objection were raised. I would rather think if it were raised and the shooting were simultaneous, that they would say the same facts obtained in this case, "We will try all cases together". That is what I would expect they would do, although they might grant you—it wouldn't be a severance—they might grant you separate trials on the identical facts.

Respondents rest.

Adjourned until Tuesday, December 2, 1924, at ten o'clock A. M.

[fol. 346] Tuesday, December 2, 1924, at 10 o'clock A. M., hearing resumed.

Morning Session

Colloquy Between Court and Counsel

Mr. Estep: The Commonwealth of Pennsylvania, and also counsel for the Warden of the Western Penitentiary, renews the motion made yesterday morning, to dissolve this writ of habeas corpus and remand the prisoner to the Warden of the Western Penitentiary, for the same reasons as were enumerated in yesterday morning's motion. Further, because the testimony offered yesterday by the relator in this case, did not show that defendant was deprived of the due process of law, as such due process of law is understood under the practice and procedure and law of the State

of Pennsylvania. Further, because this Court will take judicial notice that the final determination of this case did not take place until October 6, 1924, by reason of the Supreme Court of Pennsylvania refusing to consider the petition presented for a reargument of this case, and therefore a writ of habeas corpus does not lie at this time, but the remedy and procedure is by writ of error to the Supreme Court of the United States. Further, because the reason set out in the petition of the defendant, asking for this writ, and the testimony offered by Mr. Ammon yesterday on the stand as the reason for not taking such an appeal to the Supreme Court by writ of error, there is no testimony to show that that condition now exists, and that a writ of error could not and cannot be applied for, the time not having expired permitting such writ to be sought.

The Court: This writ of habeas corpus will be duly disposed of after full consideration of the evidence, the record, the testimony offered at this hearing, and the arguments of counsel, none of which the Court has yet had an opportunity to examine. For the present, the motion is overruled and an exception is granted to the respondents.

Mr. Wallace argued the case before the Court on behalf of petitioner.

Recess.

[fol. 347] Tuesday, December 2, 1924.

Afternoon Session

Mr. Estep argued respondent's case before the Court.

Mr. Campbell, representing the Attorney General of Pennsylvania, argued on behalf of the respondents.

Mr. Wallace further argued the petitioner's case before the Court.

Adjourned until Wednesday, December 3, 1924, at 10 o'clock A. M.

Morning Session

[fol. 348] Wednesday, December 3, 1924.

The Court: With reference to the custody of the prisoner in the habeas corpus proceeding, pending the final determination of the writ, the authorities are pretty clear upon the return of the writ, or, it has ever been held from the moment of the service of the writ, and pending the final determination of the proceeding under it, the prisoner is in the custody and control of the Court which issued the writ, or to which it is returned, and the authority of all other writs and proceedings, and the custody based thereon, is suspended. The prisoner is committed, not under the original commitment, but under the authority of the writ of habeas corpus, and pending final determination of the writ, he may be committed to any suitable place of confinement under the control of the Court, and may be brought before the Court from time to time by its order, until it is determined whether he shall be discharged or absolutely remanded.

Under all the circumstances of the case, I have made this order:

And now, December 3rd, 1924, the relator having been produced before the Court in obedience to the writ of habeas corpus issued herein, and the Court having heard the testimony and arguments of counsel, it is now ordered that the said Joseph Valotta be committed to the Allegheny County Jail, to be held in custody by the Warden of said Jail, pending the final disposition of the writ, and subject to the further order of the Court.

[fol. 349] EXHIBIT IN EVIDENCE

IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, OCTOBER TERM, 1923

No. 158

COMMONWEALTH

vs.

JOSEPH VALOTTA, Appellant

Paper Book of Appellee

Appeal from the Judgment and Sentence of the Court — Oyer and Terminer for the County of Allegheny, at No. 17, February Term, 1923

Samuel H. Gardiner, District Attorney.
Harry A. Estep, First Assistant District Attorney.

[fol. 350] Counter History of the Case

On Monday, October 30, 1922, at about 1:15 o'clock A. M., Thomas Hopkins, William Rodgers, Albert Brady and Wilbur Conoran were standing at the corner of Freedmore Street and Irwin Avenue, Pittsburgh, Penna. engaged in a conversation just prior to parting to go to their homes.

While the men were engaged in their talk Joseph Valotta, the defendant, in company with Joseph Palermo, came from Armandale Street, and walking into Irwin Avenue came to the corner upon which Thomas Hopkins and his friends were standing, and some words passed between Hopkins and Valotta, the nature of which did not appear plainly in the evidence, when Valotta drew a revolver and while Hopkins was some 10 or 12 feet away from him fired a shot through Hopkins' heart, killing him instantly.

A few minutes before the killing of Hopkins, Edward C. Couch, a police office- of the City of Pittsburgh, patrolling that neighborhood, had passed the corner on which Hopkins was standing on his way down Irwin Avenue when he heard the shot which killed Hopkins. He immediately turned and ran back to the corner of Freedmore and Irwin Avenue and

seeing Valotta and his friend Palermo running along Freedmore Street toward Brighton Road, gave chase.

Valotta, after shooting Hopkins, kept in the shadow of the buildings on the left-hand sidewalk of Freedmore Street, as he ran towards Brighton Road; while Officer Couch ran down the middle of Freedmore Street to a spot almost directly under an electric light located at the corner of Freedmore and McCullough Street-, a distance of possibly 175 feet from the corner of Freedmore and Irwin Avenue, when suddenly shots rang out from the shadow at a point near the International Garage, located at the corner of McCollough and Freedmore Street-. At the first shot Officer Couch sank to his knees when three more shots were fired in rapid succession, all of the shots taking effect in Officer Couch's body. He struggled to his feet and managed to stagger a distance of possibly 75 feet when he fell unconscious and died shortly after.

Officer Couch was in full uniform at the time he was shot and under the evidence produced in the case the uniform was discernible under the light of the electric arc located at the corner of McCullough and Freedmore Street-.

After the shooting Valotta threw his revolver away, went home and slept the balance of the night. He left home the next day and managed to elude the police for several days, finally being arrested in the Borough of Pitcairn, Allegheny County.

Argument

The defendant presents three assignments of error, the First Assignment alleging error in pronouncing the death sentence and need not be considered, it being one of the common counts usually alleged in an appeal.

The Second Assignment of error is not specific, having incorporated within it all of the reasons submitted by counsel for the defendant in his motion in arrest of judgment.

The Third Assignment is not specific, but includes all of the reasons assigned by the defendant in his motion for a new trial; these various r-asons covering numerous phases of the law of homicide.

The defendant then starts out in a general argument which covers the history of the case, but does not touch upon [fol. 351] most of the reasons incorporated in the Second

and Third Assignments of error. The Commonwealth, under these circumstances, can only undertake to answer in their order the various subdivisions contained under the Second and Third Assignments of error, and, in this connection, the Commonwealth believes that all of the subdivisions or reasons advanced in motion for arrest of judgment, and included under the head of the Second Assignment of Error, are identical with the several subdivisions included in the motion for a new trial and set out under the Third Assignment of Error, and it will, therefore, only be necessary to take up the various reasons set out under the Third Assignment of Error and answer them seriatim.

The defendant in the First and Second reason- given under the Third Assignment of Error contends that the verdict was against the law and that the verdict was against the clear weight of the evidence.

These parts of the assignment of error are without merit.

The defendant, Joseph Valotta, had taken the lives of two men, one of these men being a police officer of the City of Pittsburgh, and was undertaking to perform his duty at the very moment he was killed by gun shots from a revolver in the hands of the defendant. These facts were all presented to the jury, the Court gave full and adequate instructions on the various degrees of murder and all the phases of criminal law covering the crime. The jury found Valotta guilty of murder in the first degree for the killing of Edward C. Couch and guilty of murder in the second degree for the killing of Thomas Hopkins, and it is the contention of the Commonwealth that it is a proper verdict, under all the evidence in the case.

The defendant, in the Third, Fourth and Fifth reasons given under the Third Assignment of error, contends that:

"There was no evidence or facts or circumstances in the shole case which would warrant the jury in finding a verdict of murder in the first degree." and "That under the most favorable aspect of the whole evidence, facts and circumstances in the whole case the verdict could not rise above voluntary manslaughter," and "The double homicide, being an integral part of the same transaction, the jury having found the defendant guilty of murder in the second degree in the Hopkins case at No. 19 February Sessions,

1923, the verdict in the above case for the death of Officer Couch, could rise no higher than second degree, the defendant being in jeopardy."

These Reasons can be discussed together.

It appears from the evidence that one of the deceased, Thomas Hopkins, in company with some of his friends, had been drinking on the evening of October 29, 1922; that in the early morning of October 30th about 1:15 A. M., he, in company with Mr. Brady, Mr. Rogers and Mr. Conoran, were standing at the corner of Freedmore Street and Irwin Avenue on the North Side of the City of Pittsburgh, Pa.; that while standing there two men passed them, one of whom was the defendant. As the two men passed something was said to them, whereupon the deceased circled out into the street and walked towards the defendant and his companion. When the deceased was about 10 feet from the defendant the defendant took out his revolver and shot him; that the defendant then with his companion ran up Freedmore Street. Officer Couch, upon hearing the shooting, came along Irwin Avenue to the corner of Irwin Avenue and Freedmore Street and gave chase, and, while so doing, was shot four times by defendant.

As to the killing of Hopkins, from the testimony of the defendant himself, "That the deceased came towards him making a demonstration with his fists, and the defendant and his friend standing against the building and making no [fol. 352] attempt whatever to escape from the attack of an apparently drunken man, and when the deceased was within 10 or 12 feet from the defendant pulled out his gun and fired the fatal shot which resulted in the death of Hopkins." These facts were presented to the jury. The Commonwealth contends that under this evidence the jury was justified in rendering a verdict of murder in the second degree as to the killing of Hopkins.

As to the killing of Edward C. Couch, the officer; there was evidence that at the point where the officer was killed there was an arc light; that the buttons on his uniform were discernible and that he could be distinguished as an officer for a distance of at least 125 feet and from which the jury could draw the conclusion that he shot the officer in cold blood to effect his escape. In Commonwealth vs. Newson, 277 Pa., p. 48, it was said:

"Where one is killed by a wound in a vital part, administered by a deadly weapon, no words of provocation, reproach, abuse or slight assault are provocations sufficient to free the party killing from the guilt of murder."

In the Sixth reason given under the Third Assignment of Error, the defendant contends that:

"The verdict in the above entitled case and the Hopkins case at No. 19 February Sessions, 1923, are absolutely inconsistent and should be the same in each case, as the degree of guilt or innocence are equal in like case."

This reason is without merit.

In Commonwealth vs. Brown, 264 Pa., p. 86, Mr. Justice Frazer said:

"Where a defendant is tried for the killing of two men, under very similar circumstances, the fact that the jury returned a verdict of first degree as to one of the men and as to second degree as to the other, is not ground for reversal."

Under the Seventh reason of the Third Assignment of Error, defendant contends that the Court erred in refusing defendant's Second Point, which point and answer is as follows:

"If the prisoner believed the deceased had sought him out to kill, retreat is not necessary if Jury believe the deceased manifested an intention to commence attack; under these circumstances, the prisoner may stand and defend hi/self and even pursue his adversary until free from danger. King vs. Commonwealth, 35 P. L. H., 127; 7 Sadler 525. Refused."

This reason is without merit.

In the first place there was no evidence that would justify the defendant in believing that the deceased had sought him out to kill. The deceased was under the influence of liquor, had no weapon in his hands or on his person, and, furthermore, the point as submitted was faulty, in that it did not contain one of the principles of law in connection with this defense, namely:

"That he had no other means of escape."

In Commonwealth vs. Breyessee, 162 Pa., p. 456, Mr. Justice Williams said:

"Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. It is the duty of one who is assaulted to flee, if flight is possible, and it is only when he is persuaded that he must suffer death or grievous bodily harm at the hands of his assailant or take the life of his assailant that he may save his own, that he can justify his act as done in self defense."

[fol. 353] The Eighth reason, under the Third Assignment of Error, alleges that the Court erred in refusing defendant's sixth point, which point and answer is as follows:

"If the jury believe that the deceased made an attack and demonstration, but did not actually strike the prisoner, and was in a quarrelsome mood, and the defendant considering himself in some danger and had resort to a weapon, not to kill, but to disable the deceased, his assailant, then the verdict must be 'Not Guilty.' Refused."

This reason has no merit.

The mere fact that when a person approaches another, apparently in a quarrelsome mood, and making gestures without any weapon or instrument that might cause death or grievous harm, it is not sufficient under the law to warrant the use of a weapon, either to kill or disable his adversary.

Where the defense is self defense, as it is in this case, the defendant would be obliged to flee, if flight is possible.

Commonwealth vs. Breyesse, 160 Pa., 456, supra.

The Ninth reason under the Third Assignment of Error alleges that the Court erred in refusing defendant's Seventh point, which point and answer is as follows:

"If the prisoner was obsessed with fear, either of his life or great bodily harm, after shooting Hopkins, believed by mistake that he was being pursued by members of the Hopkins gang at the corner, and did not actually know it was a Police Officer, and shot with the belief of defend-

ing his own life, and the facts warrant such a finding, then the verdict must be 'Not Guilty.' Refused."

This reason is without merit.

In Commonwealth vs. Colandro, 231 Pa. 352, Mr. Justice Moschzisher said:

"If the circumstances are both adequate to raise and sufficient to justify a belief in the necessity to take life in order to save one's self from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense; while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter."

Therefore, whether or not the circumstances as presented were sufficient or not to excuse on the ground of self-defense was a question for the jury and for the Court to have instructed the jury that a killing by mistake absolved the defendant from all blame would have been error.

The Tenth reason under the Third Assignment of Error, alleges that the Court erred in refusing defendant's Tenth point, which point and answer is as follows:

"Where the matter of excuse or justification of the offense charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and much less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt. Tiffany vs. Commonwealth, 121 Pa. 181. 'Refused.'"

Co-nsel for defendant bases this point upon the ruling of Mr. Justice Stewart in the case of Tiffany vs. Commonwealth, 121 Pa., 181, where he said:

[fol. 354] "Where the matter of excuse or justification of an offense charged grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance

of evidence, and much less beyond a reasonable doubt, if, upon a consideration of all the evidence there be a reasonable doubt of the guilt *of* the jury are to give him the benefit of such doubt."

It is a well settled principle of law where the defendant relies on some distinct substantive ground of defense, not necessarily connected with the transaction on which the indictment is founded, such as insanity, self-defense or alibi, the burden is upon him to establish the same by a preponderance of the evidence, but where the accused confines his defense to the original transaction charged as criminal, the burden of proof never changes, but remains on the Commonwealth. In this case the defendant did not confine his defense to the original transaction, but offered an affirmative defense, and, therefore, the burden is upon him of proving it by the fair preponderance of evidence.

In Commonwealth vs. Palmer, 222 Pa., p. 299, Mr. Justice Brown said:

"The burden of proving self-defense is not placed heavily upon one accused of taking life. Sacred as is human life, he is not bound to show beyond all doubt that he was compelled to take it, but it is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise have been saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense is not to be satisfied that it was so taken, and when this affirmative defense is left in doubt it has not been established at all as a basis for acquittal."

The Eleventh reason under the Third Assignment of Error, alleges that:

"The verdict in the Hopkins indictment at No. 19 February Sessions, 1923, being first rendered in open Court by the jury, finding the defendant guilty of Murder in the Second Degree, and subsequent thereto, the verdict of First Degree, being rendered at No. 17 February Session, 1923, in the Couch indictment, placed the defendant, Joseph Valotta, in double jeopardy of life and limb, contrary to the law in such case made and provided."

This reason is without merit.

When a person is tried on two indictments charging murder and to a degree growing out of one and the same transaction, though separate in time, and no objection having been made at the time of the selection of the jury, the jury having been sworn on both indictments, it is obligatory on their part, under proper instructions of the Court, to render their verdict on both the indictments, and by so doing the defendant cannot be said to be in double jeopardy of life and limb.

The Twelfth Reason, under the Third Assignment of Error, is as follows:

"The double himicide occurring within seconds, and the status of the defendant's mind being identically the same during the continuing transaction, the verdict should be legally the same; and the verdict of first degree in the Couch indictment and the verdict of *the* Murder in the second degree in the Hopkins indictment ar*t* inconsistent and contrary to law."

This reason has already been considered in connection with one of the earliest assignments. Com. vs. Brown, 264 Pa., p. 86.

[fol. 355] The Thirteenth reason under the Third Assignment of Error, is as follows:

"The defendant, Joseph Valotta, cannot be held responsible on two indictments when the same testimony supports both charges."

This reason is without merit and has been discussed heretofore in connection with one of the earlier reasons advanced.

The Fourteenth reason, under the Third Assignment of error, is as follows:

"If in the mind of the Prosecuting Attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicide of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same Jury."

This reason is without merit.

In the case of Withers vs. Commonwealth, 5 S. & R., 59, Mr. Justice Gibson, in discussing the question of the trial of two indictments for conspiracy, found at different sessions, said:

"The only solid reason for the distinction in regard to felonies, is, that the prisoner having a right to challenge peremptorily, may choose to have a particular judge to try one of the offenses, and yet be altogether averse to him with regard to the other; and thus, if the Court did not interfere he would, in some measure, lose the benefit of his right. In the present case, the prisoner was allowed his challenges on each indictment, and has therefore no ground for complaint. But had it been otherwise, we could view these two charges only, as if they had been included in the same indictment. It would, therefore, seem that the Court, by whom they were tried, were the only judges of the proper exercise of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error."

The Fifteenth Reason, under the Third Assignment of error, is as follows:

"The double homicide being the result of one single affray, the rendition of the verdict of second degree in the Hopkins case bars the rendition of a verdict in the first degree in the Couch indictment."

This reason has already been discussed and we believe needs no further comment.

The Sixteenth reason under the Third Assignment of error is as follows:

"The indictments upon which Joe Valotta was tried in the double homicide were by virtue of the act of Assembly of the Commonwealth of Pennsylvania, Act 31 March, 1860, Sec. 74, P. L. 402; and the arraignment of the defendant, Joseph Valotta, and the peremptory challenges which he as well as the Commonwealth exercised under and by virtue of the Act of March 31, 1860, Sec. 36, P. L. 439, in such cases made and provided; and under and by virtue of said acts. The sole jurors qualified to act, being of the male sex, it was contrary to law and prejudicial to the rights of the defendant, Joseph Valotta, to have two female jurors sit as members of the jury trying for his life and liberty."

This reason is without merit

[fol. 356] In Commonwealth vs. Maxwell, 271 Pa., 378, Mr. Justice Schaffer said:

"Summing up, we conclude, there was no absolute and fixed qualification of jurors at common law, and from very ancient times their qualifications were fixed by Act of parliament; the qualification of jurors was not the thing spoken of by the section of the Constitution under consideration; the words 'as heretofore' in that section refer to the kinds of cases triable before juries and the trial, not the qualifications of the jurors; the designation 'qualified elector' embraces all electors; the term 'electors' embraces those who may be added to the electorate from time to time."

It would, therefore, appear that none of the reasons alleged under the Third Assignment of Error have any merit, and that nothing in the trial of the case or in the charge of the Court was in any way prejudicial to the rights of the defendant. He had a fair and impartial trial, and the verdict of the jury was in entire accord with the weight of the evidence.

Respectfully submitted, Samuel H. Gardner, District Attorney. Harry A. Estep, First Assistant District Attorney.

[fol. 357] [File endorsement omitted.]

[fol. 358] In United States District Court

[Title omitted]

Opinion—Filed December 17, 1924

Thomson, J.:

I approach the decision of this case with a full appreciation of the importance of the issue involved; the right of the State on the one hand, to insist that the prosecution and punishment of offenders against her laws, be in no manner impeded or denied; and the right of the citizen on the other, to insist that his life be not taken away except by due process of law. From the final judgment of a sov-

ereign state condemning him to death, a citizen of the United States, humble in birth and station, through the ancient writ of habeas corpus, appeals to the supreme law of the land.

Such an issue, not infrequent, in the administration of the law, challenges at once our most careful conscientious and fearless consideration.

The real issue involved will appear by a brief statement of the facts as disclosed by the record of the trial. Joseph Valotta, the relator a naturalized citizen of Italian birth, had been working steadily at the machine shops of the Pennsylvania Railroad in Pitttsburgh, for about seven [fol. 359] years. He was a man of good reputation for peace and good order. On July 1, 1922, a strike occurred at the railroad shops, which continued for several months. Valotta remained at work. By October 1st, its activities had largely subsided, but the strike was not fully ended for a considerable period thereafter. During July and August at least, the shops were picketed at intervals by the strikers, and the shops and workmen were guarded by mounted police. For some time officers escorted the workmen to and from their homes. At least on one occasion some demonstration of violence occurred at the works, at which Valotta was present, and to whom it appears to have been at least partially directed. Shortly afterwards, he purchased a revolver from an officer inside the plant. Assaults on workmen at different times occurred, and the situation appears to have alarmed Valotta to such an extent that he ran from the shops to his house nearby, on leaving work, and had not gone out of his home at night for about four months prior to the night of the shooting. On the night of October 30th, he went across the street to a party at his godmother's, where some friends, musicians, were playing. As he was about to leave near eleven o'clock, at the request of a friend, Palermo, Valotta took the musicians over to another house, where there was a christening. Near one o'clock Valotta and Palermo, with others, left the house, Valotta and Palermo starting down Irwin Avenue, a leading thoroughfare, on their way home. Freedmore Street, which is one block in length, extends from Irwin Avenue to Brighton Road, and is intersected in the middle of the block by McCullough Alley. On the corner of Irwin and Freedmore, three men were standing, Thomas Hopkins,

Brady and Rodgers. Brady was one of the strikers, or at least had left work on account of conditions, shortly after the strike was called. These three men had been together [fol. 360] from 10:30 o'clock in the morning, and had been drinking heavily through the day and night. When they stopped at Irwin and Freedmore Streets, they were intoxicated and disorderly, as was evidenced by loud talking, singing and wrestling on the side walk. Officer Couch notified Hopkins to go home, which he failed to do. Another man, Conoran, joined the other three on the corner near one o'clock. The night was dark and foggy, and there was no light where the men were standing. As Valotta and Palermo approached Freedmore Street, they crossed Irwin for the purpose of going down Freedmore, and in doing so walked out in the street past the point where the men were standing, and reached the sidewalk on Freedmore Street a short distance beyond the corner. As to precisely what occurred, there is some conflict, the defendant claiming that Hopkins called them scabs, and threatened to kill Valotta, as he advanced toward him. But it is clear that after the men had passed the corner, proceeding on their way, Hopkins called to the men, going out into the street and approached them, using his hands in a threatening manner. When a few feet away, it is testified that Valotta said "What are you looking for trouble?", and pulling out his revolver, fired. Hopkins fell, mortally wounded. Valotta and Palermo started running down Freedmore. Policeman Couch, who was nearby patrolling his beat, hearing the shot, pursued the fleeing men, Brady and Rodgers joining in the chase, the officer being in the lead. The officer gained on Valotta, but did not call on him to stop, or announce that he was an officer. When within a short distance of the fleeing men, Valotta suddenly fired four shots in quick succession, all of which struck the policeman. He sank to his knees, but rose again, continuing for some distance, where he fell some 200 feet from Irwin Avenue. There was a light at McCullough Alley near where the shooting occurred. Couch was removed to the hospital, where he died the following day. [fol. 361] After the shooting, Valotta and Palermo continued their flight, Rodgers and Brady failing to overtake them. Valotta went home, throwing away his revolver as he went; left his home between nine and ten o'clock, con-

cealed himself in a brickyard not far away, stayed with different friends in Pittsburgh for several nights, and then went to Pitcairn, a nearby town, to the home of an acquaintance, where he was arrested a few days later. When arrested, he did not deny the shooting; told the policeman where he had thrown the revolver, and when taken by the officers to the scene of the killing, pointed out the various spots connected with the homicide.

Two indictments charging murder, were found against Valotta, the one for the killing of Couch and the other for the killing of Hopkins, the former being No. 17 and the latter No. 19 February Sessions, 1923. Each indictment contained a count for murder and for voluntary manslaughter. The prisoner was arraigned on each indictment, and to each he pleaded Not Guilty. Valotta being without money, the Court appointed counsel to defend him. The cases were called for trial on March 12, 1923. An examination of the docket entries of the cases would lead to the conclusion that the cases were separately tried. The record at each number, shows the convening of the Court, the arraignment, the plea, the joinder of issue, the reading of the indictment, the instructions of the clerk to the jury, the list of jurors challenged, the jury made up and sworn, the list of witnesses for the Commonwealth and for the defendant, and the verdict of the jury. As a matter of fact, the cases were called by the District Attorney before the same jury at the same time, all the testimony of the Commonwealth as to both homicides being offered, and when completed, the Commonwealth rested. A verdict of Murder in the First Degree was returned by the jury for the killing of Couch, and a verdict of Murder in the Second Degree for the killing of Hopkins. The Court charged the jury with relation [fol. 362] to both indictments, submitting to them the possibility of eight several verdicts, namely, Murder in the First Degree, Murder in the Second Degree, Voluntary Manslaughter, or Not Guilty, in each case, the jury being instructed to find a separate verdict in each.

The record does not disclose, nor does it appear, that there was any offer by the Commonwealth, or any order of Court, to consolidate the indictments; any consideration by the Court as to the right or the propriety of trying the cases together; any exercise of discretion by the Court in relation thereto; any putting of the Commonwealth to an

election as to which case it would try; any suggestion to the defendant as to his right to a separate trial; any consent on behalf of the defendant or his counsel, to a joint trial on the two indictments; or any notice to the defendant of his right to twenty peremptory challenges under each indictment.

The legality of a single trial on the two indictments was raised by the defendant in his fourteenth reason for a new trial, as follows:

"14. If, in the mind of the prosecuting attorney, Joseph Valotta committed two distinct and separate homicides, and the double homicides of Couch and Hopkins were two distinct and separate acts of the defendant, then it was unlawful for the Commonwealth to try Joseph Valotta on two distinct and separate indictments before the same jury."

The Court said, "This reason is without merit." The Court then cites the case of Withers vs. Commonwealth, S. & R., 59, in support of his ruling.

The same question was again raised in the Supreme Court by an assignment of error, in the same language as that above quoted. This was disposed of by the Appellate Court in the following words:

[fol. 363] "The fifth attack made on the integrity of the verdict is that it was improper to try the defendant upon the two indictments at the same time. The record shows that he made no objection to being thus tried. Assuming, but not deciding, that notwithstanding his failure to object on trial, he can now be heard to raise the question, the simultaneous trial on two indictments charging murder is warranted, and the finding of guilty in the second degree on one indictment, does not affect the first degree conviction on the other. Commonwealth vs. Brown, 264 Pa. 85."

The judgment was affirmed, and a subsequent motion for reargument was overruled. The two cases referred to by the trial and appellate courts, I will refer to later. It thus appears that if the prisoner was denied a fundamental right in being called to answer two separate indictments before the same jury, involving his life, that denial was persisted in both in the trial court and in the appellate court. Some fundamental questions thus arise from this situation:

First. Could the prisoner be lawfully tried on two separate and distinct indictments, charging separate and distinct capital offenses, before the same jury at the same time, acording to the established law of Pennsylvania?

Second. If such trial was unlawful, has the prisoner waived his right by silence?

Third. If the trial was illegal, was the prisoner denied that due process of law guaranteed by the Fourteenth Amendment?

These questions are fundamental, and merit the most earnest consideration. We first inquire what is the law of Pennsylvania?

The legal history of Pennsylvania may be said to begin on March 4, 1682, with the charter granted to William Penn. That charter granted, inter alia, to him and his heirs, dep- [fol. 364] uties and lieutenants, for the government of the Colony, the right to ordain and publish laws, raise money for the public use of the province, and to do all things necessary for the complete establishment of justice, the establishment of courts and tribunals, and forms of adjudicature, to delegate judges, award process, hold pleas, and determine in such courts and tribunals all actions, suits and causes, criminal and civil, personal, real and mixed. It was provided that the laws in question should not be repugnant to the laws of England, and that an appeal should lie to the King. Under this charter, a series of laws followed, propounded by Penn, and subsequently enacted from time to time by the Colonial Assembly. From the grant of the charter to the Declaration of Independence, there had grown up a body of Pennsylvania law. While we have the statutes, we do not have in full, the practice established by procedure, the first published reports beginning with 1 Dallas in 1754. I am advised that a most careful examination of all Pennsylvania reports, from 1754 to 1791, shows that every indictment quoted in the reports was for a single criminal act. Justice Chase, in U. S. vs. Worrall, 2" Dallas, 384, says:

"Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others."

To clear questions of usage, many of the early Colonial Acts were passed. In the case of Res Publica vs. Roberts, 2nd Dallas, 124 (1791), the Court recognized the existence of a uniform practice in criminal procedure, when it said:

"Under the Act of Assembly, and the uniform practice of eight-five years (a practice which, though it does not make the law, must be strong evidence of what the law is), the indictment could not be supported."

[fol. 365] We must, therefore, inquire what was the common law of England as it existed in Colonial times, and to what extent has it been modified by statute, by judicial decisions, or by uniform and established practice.

I think it may be definitely stated that under the common law of England in the eighteenth century, the trial of two indictments for distinct offenses, before the same jury, was wholly unknown. It appears to have been permissible in misdemeanors to join in one indictment several counts, which might include different offenses, or different aspects of the same transaction, such as larceny and receiving stolen goods. In such case, however, the Court at the trial exercised its right and duty either to quash the indictment or to put the Crown upon its election which one it would try, in order that the prisoner might not be confounded in his defense and the jury distracted. In cases of felony, the rule was very strict. It was permissible to charge in one indictment, separate and distinct counts for felony, provided they were different legal phases of the same transaction. But, if it appeared that different counts charged separate and distinct felonies, it was the duty of the Court to quash the indictment, or to require the Crown to elect.

The Acts of Assembly of Pennsylvania, and the early decisions of the courts, since 1754, established beyond controversy, that a prisoner should not be tried for two distinct felonies before the same jury at the same time, and that the trials of separate and distinct misdemeanors rest on a very doubtful right, unless specially authorized by Act of Assembly.

Whatever the right of trial by jury was, as secured and defined by the common law of England, and as developed in Colonial practice, is the law of the land of Pennsylvania, [fol. 366] and cannot be altered except by statute. This for

the conclusive reason that the right is embodied in the Constitution of the State. Our first Constitution of 1776 declared that "trial by jury shall be as heretofore." This right was re-declared in the Constitution of 1790 and that of 1838, in these the language being, "trial by jury shall be as heretofore, and the right thereof remain inviolate."

In determining what was the common law on the question of the trial of two indictments charging separate offenses, before the same jury, from an examination of the authorities, confusion will be avoided and the decisions harmonized, by keeping in mind the distinction between misdemeanors and felonies; the distinction between different counts in the same indictment and separate indictments charging separate and distinct offenses; the distinction between several charges against one, and a joint charge against more than one, and the distinction of trial before the same jury consecutively, and that before the same jury simultaneously. The rule is well stated by Chief Justice Fuller, in U. S. vs. McMahon, 164 U. S. 76:

"In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense, or to restrict the evidence to one transaction."

In New Hampshire the rule is stated in N. H. Reports, 8, p. 163, as follows:

"No court ever permits a prisoner to be tried for two distinct and separate crimes on one indictment, because by such a course he might be confounded in his defense, and the minds of the jurors distracted. 3 D. & E. 98, Young vs. The King."

[fol. 367] The case of Young vs. The King above cited, elaborates the position. The same rule is sustained in Regina vs. Giddins, Car. & Mar. p. 634. There the defendant was charged with assaulting and robbing two men who were walking together at the time of the assault. The indictment contained one count. Motion was made to put the prosecution on election. Justice Tindle said:

"I think the counsel for the prosecution is not to be put to election. It is all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one, and the assaulting and robbing of the other, if there had been, the felonies would have been distinct; but that is not so in the present case."

The Earl of Halsbury's Laws of England, Vol. 9 p. 342, state:

"At common law, there was no legal objection to several different felonies being charged in different counts in one indictment, but it is a well-established rule of practice that if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the Judge will put the prosecutor to his election to proceed and offer evidence on one charge only," citing cases.

Wharton's Criminal Practice, Sec. 34, says:

"As to offenses of high grade in all states, and in some states as to all offenses, the court will not permit more than a single issue to go to the jury, and hence will require an election at the close of the prosecution's case, except in those cases in which offenses are so blended that it is eminently for the jury to determine which count it is that the evidence fits. The object of the rule, is, first, to enable the defendant to prepare properly for his defense; and secondly, to protect him by an individualization of the issue, in case a second prosecution is brought against him."

[fol. 368] Joyce on Indictments, Sec. 493, lays down the rule, that in distinct offenses it is the duty of the presiding Judge, without waiting for a motion to that end from the defendant, to order the prosecuting officer to elect on what charge he will continue the trial.

See also, Rex vs. Clendon, Strange, 870.

The well-established rule of the common law of Pennsylvania, forbidding the trial of distinct felonies before the same jury, has not been modified by statute. On the contrary, the rigor of the rule has been recognized in reference to the joinder of counts in one indictment. Recognizing

that it required the sanction of legislation to permit even such joinder, certain statutes have been passed for that purpose. By the Criminal Act of 1860, the District Attorney was empowered to charge wilful and involuntary manslaughter in the same indictment. Another section makes it lawful to add in one indictment for feloniously stealing property, a count for felonious receiving of the same. By another section, in the case of embezzlement by clerks and certain others in the employ of a master, to charge distinct acts of embezzlement, not exceeding three, committed against the same master within the period of six months. Section 25 of the Act, makes the arraignment of the prisoner in all cases of felony, obligatory, and provides that—

"In all cases of felony the prisoner shall be arraigned, and when any person being so arraigned shall plead Not Guilty, every such person shall be deemed and taken to put himsel- upon the inquest or country for trial, without any question being asked of him how he shall be tried, and the inquest shall be charged only to inquire whether he be guilty or not guilty of the crime charged against him, and no more."

[fol. 369] Section 40 of the Act provides for persons jointly indicted for an offense, in which case—

"It shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials, and in all cases of joint trials the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more."

The law of 1860 in reference to arraignment, was modified by the Act of 1895, by which the arraignment of defendants in Courts of Oyer and Terminer, is abolished except where the indictment charges murder.

It would thus appear plain beyond reasonable doubt, that the procedure of arraignment, plea, issue and trial, on a single issue in homicide cases, is expressly retained and preserved. And, if there be a single case, either in Pennsylvania or in England, where a person has been tried upon two indictments for two separate and distinct murders, before the same jury at the same time, and the decision has

been sustained on authority of the common law, the Court has no knowledge of its existence. The reason of the rule is based on considerations of humanity and the tender solicitude for human life, the highest gift of God. From the same humane source, have come all the safeguards which the law has thrown around the accused. The presumption of innocence; the requirement of proof of guilt beyond reasonable doubt; the provision in the Pennsylvania Constitution giving to the accused the right to be heard by himself and counsel; to demand the nature of the accusation against him; to meet the witnesses face to face, and to have compulsory process in his favor; to have a speedy public trial by an impartial jury, and that he be not compelled to give evidence against himself, nor be deprived [fol. 370] of his life, liberty or property unless by judgment of his peers and the law of the land.

The all-sufficient reasons assigned by the authorities for the rule of law awarding separate trials for distinct felonies, is that a joinder of distinct charges tends to confound the prisoner in his defense, prejudice him as to his challenges, hold him out as a habitual criminal, and distract the minds of the jurors. So plain a proposition needs no elaboration.

Is the trial of two indictments charging distinct felonies, and particularly capital offenses, before the same jury, warranted by the judicial decisions of Pennsylvania? Most certainly not. The case of Withers vs. Commonwealth, 5 S. & R. 59, relied upon by the trial court to support the Commonwealth's contention, involved the joinder of two indict ments for misdemeanors. Judge Gibson stated that he had found no case exactly like it, but found a strong analogy between it and those cases in which distinct offenses were included in separate counts of the same indictment, as the latter would be necessarily tried together; and that in cases of misdemeanors it had never been held that separate offenses could not be joined. But he adds, "As to felonies, a different rule prevails, and the Court goes so far as to quash, when distinct offenses are charged; or, if no motion for that purpose be made in time, to compel the prosecutor to elect the particular offense to which alone the prisoner is held to answer." Perhaps the chief reason which reconciled the learned jurist to the unusual procedure in that case, was that the defendant was allowed his challenges on

each indictment, and thus was not harmed. The futility of this citation to support the Government's contention, is at once apparent.

The case of Commonwealth vs. Brown, 264 Pa., 85, was [fol. 371] relied on alone by the Supreme Court to support its position that the simultaneous trial is warranted, and the finding of "Guilty in the Second Degree on one indictment, does not affect the first degree conviction on the other."

In that case, Brown broke into a store at night. Being discovered, Elford and a policeman were attempting to force their way into the store, when two shots were fired, one of which killed Elford, and the other shot killed the policeman. Two indictments were found and tried together, a verdict of Murder in the First Degree being found in one and second degree in the other.

It is sufficient to say that the question now before us was never raised at any point in the proceedings in that case. It was not discussed, nor in any manner decided by the Supreme Court, and hence, is not — be relied upon as an authority on the question. In that case too, the killings might be regarded as simultaneous acts. In the case before us, the offenses, though closely connected in point of time and place, are wholly separate and distinct. This is conclusively shown by a consideration of the facts surrounding each homicide; by the verdict of the jury finding different degrees of guilt, and finally, by the finding of the Supreme Court itself. In answer to the defendant's claim of double jeopardy, the Court said:

"How it could be contended that there is double jeopardy to a defendant in trying him for the killing of two different individuals, it is a little difficult to comprehend. Twice in jeopardy is available to a defendant as a bar only where he has been twice put in jeopardy of life or limb for the same offense * * * where two persons are killed 'by separate shots or strokes, although in the same riot or affray, an acquittal or conviction of one * * *homicide is no bar to an indictment for the other, as they are distinct acts.' "

Aside from the Valotta case, I think it may be safely said that no case in Pennsylvania can be produced from [fol. 372] the foundation of the State to the present time, in

which the Supreme Court has considered and decided that two indictments charging separate and distinct felonies of a high grade, and particularly capital felonies, may be tried together by the same jury at the same time.

Sanctioned neither by the common law, by the statute law, nor by judicial decision, the evidence taken on this hearing, shows that the practice contended for finds no support in long-established practice. The evidence shows that such procedure is unheard of in Philadelphia and throughout the Commonwealth, except in some isolated cases in Allegheny County. The Honorable John C. Haymaker, a Judge and criminal lawyer of large experience, being called by the respondent on this question, was asked:

Q. Now, in connection with the trial of both indictments, or the several indictments, where no objection has been made and no request for severance made, what has been and what is the practice and procedure in so far as the number of challenges, peremptory challenges, allowed the defendant, is concerned?

A. The same as if he was tried on one indictment."

This, of course, would deprive the prisoner of twenty peremptory challenges. The Judge being then asked by the Court whether when the offenses charged in separate indictments were somewhat closely connected, was the claimed right of the State to try the indictments together, based on a right which the State could insist upon, or based on the assumption that the defendant by his silence had waived it. The Judge's answer was, "On the assumption that the defendant has waived it by keeping quiet, sitting still."

[fol. 373] The testimony offered by the respondent thus comes very far short of establishing a long-continued and uniform practice, such as to justify the State's procedure. Such invasions in practice of the time honored rule in the prisoner's favor, neither make the law nor constitute evidence of what the law is.

2nd. We now pass to the second question: Did the defendant waive his right to separate trials by his silence?

In all criminal cases, and more particularly in felonies of high grade, the prisoner is not required to open his mouth at any stage of the proceedings. Even if he stand

mute, a plea will be entered for him by the Commonwealth, and the trial will proceed. He has the high prerogative of silence; a silence which the State dare not in any manner invade. In criminal proceedings involving the life of the prisoner, every step of the State's procedure is adverse, resting not at all on the prisoner's consent, from the time of his arrest on warranty, until he is led on the scaffold and the fatal trap is sprung.

In the remorseless movement of the State's criminal machinery, consent has no place at all. The result which follows when adverse to the prisoner, is justified only when procured by established procedure in strict accord with the law of the land. What course of reasoning when human life is at stake, can justify an invasion by the State of a right of the prisoner guaranteed him by the law, on the ground that the prisoner has not spoken and has therefore by his silence consented?

In Lewis vs. United States, 146 U. S. 370, were laid down some fundamental principles. Among these, that a [fol. 374] prisoner cannot waive the substantial rights incident to trial by jury; that the right of challenge is a substantial right; that it must appear affirmatively on the record that the prisoner enjoyed the rights guaranteed to him by the Constitution. The Supreme Court quotes with approval, on page 372, the case of Prine vs. Commonwealth, 18 Pa. 103, holding, "We are of opinion that it was not within the power of the accused or his counsel, to dispense with the statutory requirement as to his personal presence at the trial." The Court again said, "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

This position has been fully sustained in Prine vs. Commonwealth, supra, Mills vs. Commonwealth, 13 Pa. 627. In the former, the Court said:

"I need not repeat the authorities which say that consent cannot give jurisdiction. In criminal proceedings especially,

that axiom has grown with the growth, and strengthened with the strength of the law. Trials by Lynch law might otherwise be valid; but at times, I dare to say a man might consent to their jurisdiction in hope or in fear, or perhaps in ignorance * * * Some affidavits and some certificates of such consent were produced at bar, but the counsel for the defendant absolutely denied it on their affidavit. But we can regard neither the one nor the other; they are no part of the record, nor can they be made such. But for myself, I think it a matter of no account, and if the prisoner had appeared in court, and under his sign manual, it would not have the slighest influence with me. I look to the law of the land."

[fol. 375] We now come to the third inquiry upon which the question of jurisdiction rests.

Did the State in violating the relator's right to a separate trial on the two indictments for murder, deny to him that due process of law guaranteed by the Fourteenth Amendment?

Various definitions have been given by the authorities to the words "due process of law." While certain governing principles have been distinctly announced, and certain boundary stakes driven, the Supreme Court has never undertaken to give a comprehensive definition of the term, nor undertaken to limit its meaning and scope by lines definitely drawn. The Court has preferred to rest such decision on the facts of each case as it arose. But from these decisions we know that the prohibition is directed to the State itself, and if a violation be threatened by one agency of the State, but prevented by another agency of higher authority, there is no violation by the State. We know that the State can go very far in the exercise of its sovereign power, in the passage of laws, regulating procedure, evidence, and methods of trial, not in conflict with the Federal Constitution. It may make indictment by grand jury unnecessary in prosecutions for homicide; may make lawful the prosecution of felonies by information; may limit the number of challenges allowed the defendant, or regulate the number, in relation the population of cities; may confer upon the accused the right to waive a trial by jury, and elect to be tried by the Judge; may take away trial by

jury altogether, both in criminal and civil cases; may abolish courts and establish new ones, with new modes of procedure, leaving unchanged those substantial protections, with which the existing laws surround persons accused of crime. These powers, and very many more, some of which are summarized by Justice Moody in the case of Twining [fol. 376] vs. New Jersey, 211 U. S. 53, the State in the exercise of its sovereignty, may lawfully exert, and the laws and modes of procedure which the State establishes, every citizen thereof is absolutely bound to obey. To him they become "The Law of the land." As was said by Chief Justice Waite, in Walker vs. Sauvinet, 92 U. S., 90:

"Due process of law is process due, according to the law of the land. This process in the states, is regulated by the law of the state."

From the duty of the citizens to obey the laws of the state, arises the corresponding right of the citizen to insist that the state comply with its own laws; and to demand in the language of the Constitution of the State, that he be not deprived of his life, liberty or his property, unless by the judgment of his peers, or the law of the land.

Measured by this standard, what conclusion follows? Under the law of the land, to proceed against Valotta for two distinct homicides, two indictments were legally essential, found and returned by a duly constituted grand jury. In each indictment the charge must be distinctly set forth in order that the accused may properly prepare his defense, and be so identified that he may plead, on a subsequent charge for the same offense, former conviction or former acquittal. On each indictment, he must be arraigned, and out of the arraignment comes the plea, and the issue of guilt or innocence, between the Commonwealth and the accused. All these solemn pre-requisites are intended to safeguard the rights of the prisoner in the important issue to be determined by the trial. To secure a fair and impartial jury, twenty peremptory challenges are allowed him. He is entitled to be present at every stage of the proceedings, and to meet the witnesses face to face. With [fol. 377] all these evidences of the state's solicitude for the protection of the accuse-, can it be possible that in the trial itself, in which are the issues of life and death, the officers of the State can deprive the prisoner of the essen-

tial right to a separate trial on the issue solemnly raised, on each indictment? Can they be permitted to mingle and confuse the cases, by making hotchpot- of the indictments and the issues before a single jury, and jeopardize the life of the prisoner by holding him out as an habitual criminal; denying him his full legal right of challenges, confound the prisoner in his defense, and distr-ct the minds of the jury? Such an invasion of the established course of trial in high felonies, rises far above mere irregularity of procedure. The time-honored right of a prisoner to a separate trial on each indictment involving his life, which has been recognized for centuries, upheld by the courts as a continuous expression of the consciousness of the people, unchanged in the progress and development of the law, is basic, fundamental, and absolute, and involved in the very conception of free government.

If we stop to inquire, did harm result to the prisoner from such a procedure, the answer is to be found in the verdict. Our statute provides: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, shall be deemed murder of the first degree; and all other kinds of murder" (save those committed in the preparation of certain designated felonies) "shall be deemed murder of the second degree." Thus, two of the most conspicuous examples were chosen by the lawmakers to illustrate their meaning of wilful, deliberate and premeditated [fol. 378] murder. And yet, the jury, from a set of circumstances which practically precluded the existence of a wilful, deliberate and premeditated intent to kill,—flight in the darkness, pursuit by supposed enemies, and a condition of mental terror, with no time for premeditation or deliberation,—out of these comes a verdict of murder of the first degree, followed by sentence of death.

Jurisdiction of the subject-matter of the offense, the place where it was committed, and the person of the prisoner, the trial Court undoubtedly had. But this jurisdiction was lost by the denial of the prisoner's fundamental right to a separate trial before a separate jury on each indictment against him. Being thus denied that due process of law guaranteed to every citizen under the Constitution, it follows that the Court's proceedings and judgment against

him, were null and void, and the relator is held in custody in violation of the Constitution of the United States.

I have given due consideration to the various decisions of the Supreme Court, touching the power and duty of the Court on writs of habeas corpus, from Ex Parte Royal, 117 U. S. 241, to Frank vs. Mangum, 237 U. S. 325, and the latest important deliverance of the Court in Moore vs. Dempsey, 261 U. S. 93; and whatever the guilt of the prisoner, which it is not my province to determine, I have endeavored to follow the course succinctly stated by the learned Judge in Mills vs. Commonwealth, "Heeding neither the impulses of passion, nor tolerating the intrusion of prejudice; but in calm severity of judgment applying the rules of the criminal law." The relator is therefore discharged.

[fol. 379] [File endorsement omitted.]

[fol. 380] In United States District Court

[Title omitted]

Judgment—Filed December 19, 1924

And now, to-wit, December 19, 1924, the foregoing case having come on for hearing, on testimony taken and arguments of counsel, and upon consideration thereof, for the reasons set forth in opinion filed, the relator Joseph Valotta, is discharged.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 381] [File endorsement omitted]

[fol. 382] In United States District Court

[Title omitted]

Petition for Appeal—Filed January 5, 1925

And now January 5th, 1925, comes Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, respondent above named, and with him the

Commonwealth of Pennsylvania, appellants herein, and says:

That on the 19th day of December, 1924, the United States District Court for the Western District of Pennsylvania entered an order herein discharging relator from the custody of appellants, in which order and proceedings, had prior thereto in this cause, certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the Assignments of Error filed.

Wherefore, the appellants pray that an appeal in their behalf to the Supreme Court of the United States for the correction of the errors so complained of be allowed and that a transcript of the records, proceedings and papers in this cause, duly authenticated, be sent to the Supreme Court of the United States.

George W. Woodruff, Attorney General of Pennsylvania; James O. Campbell, First Deputy Attorney General of Pennsylvania; Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania; Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania, Attorneys for Appellants.

[fol. 383] In United States District Court

Order Allowing Appeal—Filed January 5, 1925

And now, this 5th day of January, 1925, it appearing to the Court that there is probable cause for appeal in the above entitled case, and the Court hereby certifies that there is probable cause for such allowance, it is ordered that an appeal be allowed as prayed for.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 384] [File endorsement omitted]

[fol. 385] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 5, 1925

And now, to-wit, January 5th, 1925, comes Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, respondent above named, and with him the Commonwealth of Pennsylvania, appellants herein, by George W. Woodruff, Attorney General of Pennsylvania; by James O. Campbell, First Deputy Attorney General of Pennsylvania; by Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania; and by Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania, his attorneys, and having presented his petition for an appeal in the above entitled case files therewith the following assignment of errors upon which he relies to sustain the appeal prayed for;

First. The Court erred in denying the respondent's motion to dissolve the writ of habeas corpus issued in this case.

Second. The Court erred in refusing to remand the relator to the custody of respondent.

Third. The Court erred in holding that it had jurisdiction to discharge the relator.

Fourth. The Court erred in finding that the record failed to disclose and that it did not appear that the trial court exercised its discretion in relation to the right of trying the [fol. 386] relator on the said two indictments at the same time, before the same jury.

Fifth. The Court erred in finding that the relator had been deprived of his full and legal right of challenge.

Sixth. The Court erred in finding that the Acts of Assembly of Pennsylvania, and the early decisions of the Courts since 1754 established beyond controversy that a prisoner should not be tried for two distinct felonies before the same jury at the same time.

Seventh. The Court erred in finding that the right of a prisoner to a separate trial on each indictment involving his life is basic, fundamental and absolute and involved in the very conception of free government.

Eighth The Court erred in finding that the facts in this case practically precluded the existence of a willful, deliberate and premeditated intent to kill.

Ninth. The Court erred in holding that the relator had been deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Tenth. The Court erred in holding that the trial court lost its jurisdiction over the relator by the denial of his fundamental right to a separate trial before a separate jury on each indictment against him.

Eleventh. The Court erred in holding that the trial court's proceedings and its judgment against the relator were null and void, and that the relator is held in custody in violation of the Constitution of the United States.

Twelfth. The Court erred in discharging the relator.

[fol. 387] Thirteenth. The Court erred in making the following order:

"And now, to-wit, December 19th, 1924, the foregoing case having come on for hearing, on testimony taken and arguments of counsel, and upon consideration thereof, for the reasons set forth in opinion filed, the relator, Joseph Valotta, is discharged.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

And because of other errors appearing upon the face of the record.

Wherefore, for these and other manifest errors the said appellants pray that the judgment and order of the District Court of the United States for the Western District of Pennsylvania be reversed and set aside and held for naught, and that the relator be remanded to the custody of the ap-

pellants for the purpose of carrying out the sentence of the trial court.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania. Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania.

[fol. 388] [File endorsement omitted]

[fol. 389] In United States District Court

[Title omitted]

Petition and Order Extending Time—Filed January 5, 1925

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9, 1925, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account of the extended time required by the Clerk of this Court to prepare a transcript of the record, your petitioners will

be unable to file the record in the Supreme Court of the United States by said return day.

[fol. 390] Wherefore your petitioners pray that they be granted an enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of March, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny County.

[fol. 391] Joinder in Petition

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

Wallace & Patterson, Counsel for Relator.

[fol. 392] Order of Court

And now, to-wit, this 5th day of January, 1925, for satisfactory reasons appearing to the Court, the time for filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of March, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 393] [File endorsement omitted

[fol. 394] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed January 18, 1925

To J. Wood Clark, Esq., clerk:

You will please prepare and certify a transcript of the record in the above entitled case for the use of the Supreme Court of the United States, including therein the following:

Docket Entries.

Petition of relator for the issuance of the Writ of habeas corpus directed to the respondent, and the order of Court granting the same, also exhibits filed therewith as follows:

Printed record on appeal to the Supreme Court of Pennsylvania.

Transcript of record at No. 19 February Session, 1923, in the Court of Oyer and Terminer of Allegheny County.

Opinion of Supreme Court of Pennsylvania on appeal.

Petition for re-argument to Supreme Court of Pennsylvania, and action of Court thereon.

The writ of habeas corpus and return of service thereof.

Respondent's answer.

Traverse of relator.

Supplementary petition filed by relator.

Testimony taken at hearing before the United States District Court.

Paper books on appeal to the Supreme Court of Pennsylvania.

[fol. 395] Opinion and Order of Court discharging the relator.

Petition for appeal to the Supreme Court of the United States.

Order of Court granting petition for appeal.

Assignment of errors.

Citation to appeal.

Petition and order to enlarge time for filing record on appeal.

This præcipe upon behalf of appellants for making up the transcript of the record, together with stipulation of counsel thereto.

Proof of service of this præcipe.

Clerk's certificate.

And all other pleadings, proceedings, papers and orders which may become a part of the record in said case.

George W. Woodruff, Attorney General of Pennsylvania; James O. Campbell, First Deputy Attorney General of Pennsylvania; Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania; Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania, Attorneys for Appellants.

[fol. 396] [Title omitted]

Acceptance of Service

The appellee in the above stated cause, Joseph Valotta through his attorneys, Wallace and Patterson, Esq., and Franklin A. Ammon Esq., hereby acknowledge service of a copy of the foregoing præcipe for t-anscript of record this 18 day of February, 1925.

Wallace & Patterson, Franklin A. Ammon, Attorneys for Appellee.

[fol 397] [File endorsement omitted]

[fol. 398] In United States District Court

[Title omitted]

Petition and Order Extending Time—Filed March 3, 1925

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9th, 1925, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account of the extended time required by the Clerk of this Court to

[fol. 399] prepare a transcript of the record, your petitioners will be unable to file the record in the Supreme Court of the United States by March 9th, 1925, pursuant to the order of this Court dated January 5th, 1925, granting an enlargement of time for filing record on appeal.

Fourth. That on February 18th, 1925, petitioners filed a præcipe for said record, at which time the Clerk of the above Court informed your petitioners that it would take at least one more month from March 9th, 1925, to complete said record.

Wherefore your petitioners pray that they be granted an enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of April, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny Couny.

[fol. 400] ORDER OF COURT

And now, to-wit, this 3rd day of March, 1925, for satisfactory reasons appearing to the Court, the time for filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of April, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 401] JOIN-ER IN PETITION

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

Wallace & Patterson, F. A. Ammon, Counsel for Relator.

[fol. 402] [File endorsement omitted]

[fol. 403] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER EXTENDING TIME—Filed April 3, 1925

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County, and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9th, 1924, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account of the extended time required by the Clerk of this Court [fol. 404] to prepare a transcript of the record, your petitioners will be unable to file the record in the Supreme Court of the United States by April 9th, 1925, pursuant to the order of this Court dated March 3rd, 1925, granting an enlargement of time for filing record on appeal.

Fourth. That on February 18, 1925, petitioners filed a præcipe for said record, at which time the Clerk of the above Court informed your petitioners that it would take at least until April 9th, 1925, to complete said record, and on April 1st, 1925, said Clerk further informed your petitioners that it would take at least one more month from April 9th, 1925, to complete said record.

Wherefore your petitioners pray that they be granted an enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of May, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny County.

[fol. 405] Joinder in Petition

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

George R. Wallace, Wallace & Patterson, F. A. Ammon, Counsel for Relator.

[fol. 406] Order of Court

And now, to-wit, April 3rd, 1925, for satisfactory reasons appearing to the Court, the time for filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of May, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 407] In United States District Court

[Title omitted]

Petition and Order Extending Time—Filed June 5, 1927

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General

of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County, and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9th, 1925, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account of the extended time required by the Clerk of this Court to prepare a transcript of the record your petitioners will [fol. 408] be unable to file the record in the Supreme Court of the United States by said return day.

Wherefore your petitioners pray that they be granted to enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of March, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny County.

[fol. 409] Joinder in Petition

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

Wallace & Patterson, Counsel for Relator.

[fol. 410] Order of Court

And now, to-wit, this 5th day of January, 1925, for satisfactory reasons appearing to the Court, the time for

filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of March, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 411] [File endorsement omitted.]

[fol. 412] In United States District Court

[Title omitted]

Petition and Order Extending Time—Filed April 3, 1925

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County, and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9th, 1925, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account [fol. 413] of the extended time required by the Clerk of this Court to prepare a transcript of the record, your petitioners will be unable to file the record in the Supreme Court of the United States by April 9th, 1925, pursuant to the order of this Court dated March 3rd, 1925, granting an enlargement of the time for filing record on appeal.

Fourth. That on February 18th, 1925, petitioners filed a præcipe for said record, at which time the Clerk of the above Court informed your petitioners that it would take at least until April 9th, 1925, to complete said record, and on April 1st, 1925, said Clerk further informed your petitioners that it would take at least one more month from April 9th, 1925, to complete said record.

Wherefore your petitioners pray that they be granted an enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of May, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny County.

[fol. 414] Joinder in Petition

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

George R. Wallace, Wallace & Patterson, F. A. Ammon, Counsel for Relator.

[fol. 415] Order of Court

And now, to-wit, April 3d, 1925, for satisfactory reasons appearing to the Court, the time for filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of May, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 416] [File endorsement omitted.]

[fol. 417] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER EXTENDING TIME—Filed March 3, 1925

To the Honorable the Judges of said Court:

The petition of Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, and the Commonwealth of Pennsylvania, by their attorneys, George W. Woodruff, Esq., Attorney General of Pennsylvania, James O. Campbell, First Deputy Attorney General of Pennsylvania, Samuel H. Gardner, District Attorney of Allegheny County and Harry A. Estep, First Assistant District Attorney of Allegheny County, respectfully sets forth:

First. That an order was rendered on December 19th, 1924, by your Honorable Court discharging relator from the custody of petitioners.

Second. That your petitioners have been granted an appeal to the Supreme Court of the United States from that order, and that a citation has been issued for the relator on January 9th, 1925, returnable thirty days thereafter.

Third. Your petitioner further shows that on account of the negotiations of counsel to agree upon a statement of the evidence for the record in the appeal, and on account of [fol. 418] the extended time required by the Clerk of this Court to prepare a transcript of the record, your petitioners will be unable to file the record in the Supreme Court of the United States by March 9th, 1925, pursuant to the order of this Court dated January 5th, 1925, granting an enlargement of time for filing record on appeal.

Fourth. That on February 18th, 1925, petitioners filed a præcipe for said record, at which time the Clerk of the above Court informed your petitioners that it would take at least one more month from March 9th, 1925, to complete said record.

Wherefore your petitioners pray that they be granted an enlargement of time in which to file the record in the Supreme Court of the United States, and that they be allowed until the ninth day of April, 1925, to file the record on appeal.

And they will ever pray, etc.

George W. Woodruff, Attorney General of Pennsylvania. James O. Campbell, First Deputy Attorney General of Pennsylvania. Samuel H. Gardner, District Attorney of Allegheny County. Harry A. Estep, First Assistant District Attorney of Allegheny County.

[fol. 419] Order of Court

And now, to-wit, this 3d day of March, 1925, for satisfactory reasons appearing to the Court, the time for filing the record in this cause, in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the ninth day of April, 1925.

W. H. S. Thomson, United States District Judge for the Western District of Pennsylvania.

[fol. 420] Joinder in Petition

We hereby join in the foregoing Petition and consent to the entry of the Order prayed for.

Wallace & Patterson, F. A. Ammon, Counsel for Relator.

[fol. 421] [File endorsement omitted.]

[fol. 422] Citation in usual form, showing service on F. A. Ammon, omitted in printing.

[fol. 423] Clerk's certificate to foregoing papers omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fols. 424 & 425] Bond on appeal for $500.00, approved and filed May 22, 1925, omitted in printing.

Endorsed on cover: File No. 31,244. W. Pennsylvania D. C. U. S. Term No. 521. Stanley P. Ashe, Warden of the State penitentiary for the western district of Pennsylvania, appellant, vs. The United States of America ex rel. Joseph Valotta. Filed June 1st, 1925. File No. 31,244.

Office Supreme Court, U. S.
FILED
FEB 9 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925
No. 521

STANLEY P. ASHE, WARDEN OF THE STATE PENITENTIARY FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *Appellant,*

vs.

THE UNITED STATES OF AMERICA EX REL. JOSEPH VALOTTA.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLANT

GEORGE W. WOODRUFF,
Attorney General of Pennsylvania.

JAMES O. CAMPBELL,
First Deputy Attorney General of Pennsylvania.

SAMUEL H. GARDNER,
District Attorney of Allegheny County, Pennsylvania.

HARRY A. ESTEP,
First Assistant District Attorney of Allegheny County, Pennsylvania.
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925
No. 521

STANLEY P. ASHE, WARDEN OF THE STATE PENITENTIARY FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *Appellant,*

vs.

THE UNITED STATES OF AMERICA EX REL. JOSEPH VALOTTA.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

I

OPINION OF THE COURT BELOW

The opinion delivered by the Court below in this case is reported in 2 Fed. (2d) 735.

II

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

(1) The judgment of the Court herein appealed from was rendered December 19, 1924 (R. 340), and the appeal was allowed on January 5, 1925 (R. 341).

(2) Upon a writ of *habeas corpus* to discharge relator from the custody of a State officer, who detained him by virtue of process issued out of a State Court based upon

conviction of murder, relator claimed that he had been denied his right to due process of law and to the equal protection of the law, as guaranteed under the Fourteenth Amendment to the Constitution of the United States (R.6-7), because of his simultaneous trial on two separate indictments, each charging murder, and because there was no evidence to sustain a verdict of murder in the first degree (R. 6-7).

Relator, having shot and killed H. on a public street, fled immediately, pursued by C., a police officer. Within 100 feet of the place where H. was killed, relator shot and killed C. He was indicted in the State Court for the murder of H.; at a different Number of the same Term, in the same Court, he was indicted for the murder of C. and was tried simultaneously on these two indictments, before the same jury, issue having been joined on each indictment separately. (R. 325-326.)

The lower Court sustained relator's claim and discharged him. (R. 339-340.)

(3) The jurisdiction of this Court on appeal is invoked under Section 238 of the Judicial Code as amended, Act of Congress January 28, 1915, C. 22, Sec. 2, 38 Stat. 803, Comp. Stat. Sec. 1215.

> "Appeals and writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States * * * ."

(4) The jurisdiction of this Court on appeal is sustained in—

> *Horn* v. *Mitchell*, 243 U. S. 247.
> *Pothier* v. *Rodman*, 261 U. S. 307.
> *U. S. ex rel. Kennedy* v. *Tyler, U. S. Supreme Court*, No. 125 October T., 1925.

III

STATEMENT OF THE CASE

This appeal is from judgment and order of the United States District Court of the United States for the Western District of Pennsylvania, Thomson J., discharging relator on a writ of *habeas corpus* from the custody of appellant, Warden of the Penitentiary of the State of Pennsylvania, who detained him by virtue of process issued out of the State Court following conviction of murder in the first degree. The history of the case follows:

Joseph Valotta, the relator and appellee, with a companion, about one o'clock A. M., October 30, 1922, met Thomas Hopkins and three companions at the Corner of Freedmore Street and Irwin Avenue, Pittsburgh, Pennsylvania. Some trouble arose between Hopkins and his friends on the one side and Valotta and his friend on the other, the exact nature of which does not appear clearly from the evidence. Hopkins, who was unarmed, called Valotta a "scab" and approached him threatingly. Valotta making no effort to escape, drew his revolver, and while Hopkins was some ten or twelve feet away from him fired a shot into Hopkins heart, killing him instantly. This shot was heard by Couch, a police officer, who was patroling his beat and was a short distance away. He immediately started in the direction from which the shot was fired and, as he approached, Valotta and his companion ran down Freedmore Street pursued by the policeman.

Valotta ran in the shadows of the buildings on the left hand side of Freedmore Street, while the officer ran in the middle of Freedmore Street. The officer gained on Valotta, but did not call on him to stop or announce that he was an officer. When the officer reached the corner of Freedmore and McCullough Streets, where there was a lighted electric street light, being a distance of possibly one hundred and seventy-five feet from the corner of Freedmore Street and Irwin Avenue, the scene of the Hopkins homicide, Valotta, being then about twenty feet in advance of the officer, suddenly fired four shots in quick succession, all of which struck the policeman. At the first shot the officer sank to his

knees, but continuing his pursuit received the remaining three shots and fell mortally wounded some twenty-five feet from the corner of Freedmore and McCullough Streets. Valotta continued his flight and was apprehended a few days later. Couch was in full uniform at the time he was shot (R. 233-234 and 324-326). Two indictments charging murder were found against Valotta, the one for the killing of Couch and the other for the killing of Hopkins, the former being No. 17 and the latter No. 19, February Sessions, 1923, of the Oyer and Terminer Court of the County of Allegheny, Pennsylvania, within which each homicide occurred. The prisoner was arraigned on each indictment and to each he pleaded not guilty and issue was joined. The trial of the defendant on the two indictments before the same jury at the same time was proceeded with without objection on the part of the defendant.

A verdict of murder in the first degree was returned by the jury on the indictment charging the murder of Couch and a verdict of murder in the second degree on the indictment charging the murder of Hopkins (R. 326).

Valotta's defense to the killing of Hopkins was self-defense, contending that Hopkins and his companions who had been strikers in a recent shop strike were about to attack him because he, a workman in the same shop, had refused to strike, but had continued to work. His defense to the killing of Couch was also self-defense, contending that he did not know that Couch was a police officer, but thought that he was one of Hopkins' companions who was pursuing him. There was evidence from which the jury could have concluded that there was sufficient light to enable Valotta to see that Couch was in uniform. The shots were fired with accurate aim, some of which from so short a distance that they left powder marks on the face of Couch (R. 234-235).

Motions in arrest of judgment and for a new trial were made in the Couch case in which he, for the first time, raised the questions afterwards raised on the writ of *habeas corpus* (R. 200 and 224). These motions were overruled by the trial Court. The defendant was sentenced to death and delivered into the custody of the appellant, Warden of the

State Penitentiary, for compliance with sentence. An appeal in the Couch case was taken to the Supreme Court of Pennsylvania, the Court of last resort in that State, in which the main questions now raised were assigned for error. The judgment was affirmed (R. 233-236). Subsequently a petition for a reargument was presented to the Supreme Court of Pennsylvania which was refused.

A writ of *habeas corpus* on petition of Valotta was issued out of the United States Court for the Western District of Pennsylvania directed to appellant as Warden as aforesaid. In an opinion filed the United States District Court ordered that the relator be discharged (R. 323-340) from which judgment this appeal was taken.

IV

SPECIFICATION OF ASSIGNED ERRORS

And now, to wit, December 19th, 1924, comes Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, respondent above named, and with him the Commonwealth of Pennsylvania appellants herein, by George W. Woodruff, Attorney General of Pennsylvania; by James O. Campbell, First Deputy Attorney General of Pennsylvania; by Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania; and by Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania, his attorneys, and having presented his petition for an appeal in the above entitled case files therewith the following assignment of errors upon which he relies to sustain the appeal prayed for:

First: The Court erred in denying the respondent's motion to dissolve the writ of *habeas corpus* issued in this case.

Second: The Court erred in refusing to remand the relator to the custody of respondent.

Third: The Court erred in holding that it had jurisdiction to discharge the relator.

Fourth: The Court erred in finding that the record failed to disclose and that it did not appear that the trial Court exercised its discretion in relation to the right of trying the relator on the said two indictments at the same time, before the same jury.

Fifth: The Court erred in finding that the relator had been deprived of his full and legal right of challenge.

Sixth: The Court erred in finding that the Acts of Assembly of Pennsylvania, and the early decisions of the Courts since 1754, established beyond controversy that a prisoner should not be tried for two distinct felonies before the same jury at the same time.

Seventh: The Court erred in finding that the right of a prisoner to a separate trial on each indictment involving his life is basic, fundamental and absolute and involved in the very conception of free government.

Eighth: The Court erred in finding that the facts in this case practically precluded the existence of a wilful, deliberate and premeditated intent to kill.

Ninth: The Court erred in holding that the relator had been deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Tenth: The Court erred in holding that the trial Court lost its jurisdiction over the relator by the denial of his fundamental right to a separate trial before a separate jury on each indictment against him.

Eleventh: The Court erred in holding that the trial Court's proceedings and its judgment against the relator were null and void, and that the relator is held in custody in violation of the Constitution of the United States.

Twelfth: The Court erred in discharging the relator.

Thirteenth: The Court erred in making the following order:

"And now, to-wit, December 19th, 1924, the foregoing case having come on for hearing, on testimony taken and arguments of counsel, and upon consideration thereof, for the reasons set forth in opinion filed, the relator, Joseph Valotta, is discharged.

W. H. S. THOMSON,
United States District Judge
for the Western District of
Pennsylvania."

And because of other errors appearing upon the face of the record.

WHEREFORE, for these and other manifest errors the said appellants pray that the judgment and order of the District Court of the United States for the Western District of Pennsylvania be reversed and set aside and held for naught, and that the relator be remanded to the custody of the appellants for the purpose of carrying out the sentence of the Trial Court. (R. 342.)

V

SUMMARY OF ARGUMENT

1. The judgment of the trial Court, under which relator was sentenced, having been affirmed by the State Supreme Court and no writ of error having been applied for from this Court, the writ of *habeas corpus* is being employed as a substitute for a writ of error and should be discharged and the prisoner remanded.

The instant case is not within any exceptions to the rule.

Even if the simultaneous trial on two indictments, each charging murder of a different person, deprives defendant of due process of law, it constitutes mere error in point of law, and does not cause loss of jurisdiction by the trial Court.

2. Relator, in connection with his trial and sentence, was accorded all of his constitutional rights.

(1) Matters of procedure are not included within the due process clause of the Constitution.

A. General Rule.

B. and C. This Court has sustained all State laws, statutory or judicially declared, which have come before it, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. A discussion of (B) the case of *Twining v. New Jersey* and cases adjudicated prior thereto, and (C) cases adjudicated subsequent thereto.

The consolidation for trial of two or more indictments, against the same defendant, charging separate and distinct felonies is not prohibited by the due process clause of the Constitution as appears by:

D. Historical Test.

(a) The English rule (b) as adopted in this country is that, while the general rule is that such consolidation will not be permitted over the objection of defendant, its application is in the sound discretion of the trial court, not sub-

ject to demurrer or a cause for arrest of judgment or subject to appeal;

E. Analytical Test. This rule is supported by the decisions of (a) the Pennsylvania Court and (b) the United States Courts;

F. Also supported by the common practice of the people.

(2) Application of the above rules to the instant case.

(3) Defendant is bound by his failure to object to his trial, simultaneously, on the two indictments.

(4) (a) No specific order of consolidation was necessary, it clearly appearing that the State Courts have, in the exercise of their discretion, approved the method followed.

(b) Defendant was not deprived of any right of challenge. The right to any specific number of peremptory challenges, in a trial in a State Court, is not guaranteed by the Federal Constitution.

ARGUMENT

1. THE WRIT OF HABEAS CORPUS CANNOT BE EMPLOYED AS A SUBSTITUTE FOR A WRIT OF ERROR, THEREFORE THE JUDGMENT SHOULD BE REVERSED AND THE WRIT DISCHARGED.

This question is raised by the first, second and third assignments of errors. (R. 342.)

It was raised by appellant before the Court below by motion to discharge the writ and remand the prisoner. (R. 244-246, fourth and seventh reasons.)

The relator was tried, convicted and sentenced by the proper trial Court of Pennsylvania for a murder committed within that State. The judgment of the trial Court was affirmed by the Supreme Court of Pennsylvania, the Court of last resort therein, on January 7, 1924 (R. 233, 236),

and no application was made for a writ of error to remove the cause to this Court. Subsequently a motion for reargument was presented to the Supreme Court of Pennsylvania, which was refused on October 6, 1924. (R. 236.) The petition for writ of *habeas corpus* was filed in the United States District Court, October 15, 1924 (R. 3), and the writ issued same day. (R. 239.)

In the case of *United States ex rel. Kennedy* vs. *Tyler*, No. 125 October Term, 1925 (October 12, 1925), this Court reviewed and reaffirmed the cases, holding that the writ of *habeas corpus* cannot be employed as a substitute for a writ of error.

In that case the relators had been, by the supreme court of the State of New York, adjudged guilty of contempt for disobeying its order prohibiting certain action with reference to land within an Indian reservation.

A writ of *habeas corpus* was issued out of the Federal District Court for the Western District of New York based upon an allegation that relators had been denied the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The court below exercised its discretion in issuing the writ principally on the ground that relators, being Seneca Indians, were wards of the Nation and entitled to the protection of the federal courts.

The Federal Court decided the matter on its merits and dismissed the writ.

This Court affirmed the judgment of the lower Court but states that the writ should have been discharged because the case did not come within the class of cases in which that writ lies to review the action of a State court of last resort, rather than upon the merits.

In its opinion this Court says:

> "* * * In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions (treaty or constitutional rights) should first be exhausted. When that has been done, the authority of this court may be invoked to protect a

party against any adverse decision involving a denial of a federal right properly asserted by him.

"The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of *habeas corpus* to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. *Ex parte Royall,* 117 U. S. 241, 250-253; *In re Wood,* 140 U. S. 278, 289; *In re Frederich,* 149 U. S. 70, 77-78; *New York* v. *Eno,* 155 U. S. 89, 98; *Whitten* v. *Tomlinson,* 160 U. S. 231, 240-242; *Baker* v. *Grice,* 169 U. S. 284, 290; *Tinsley* v. *Anderson,* 171 U. S. 101, 104-105; *Davis* v. *Burke,* 179 U. S. 399, 401-403; *Riggins* v. *United States,* 199 U. S. 547, 549; *Drury* v. *Lewis,* 200 U. S. 1, 6; *Glaskow* v. *Moyer,* 225 U. S. 420, 428; *Johnson* v. *Hoy,* 227 U. S. 245, 247."

(a) *Rule Applied.*

The general rule that the writ of *habeas corpus* cannot be utilized for the purpose of proceedings in error or as a substitute for a writ of error has also been applied in the following cases:

Goto vs. *Lane,* 265 U. S. 393, 401, 402. This case arose on appeal from the District Court of Hawaii refusing a writ of *habeas corpus* to release appellants from custody under a conviction in a territorial court on an indictment for an infamous crime in which certain constitutional questions arose regarding the decision of the trial court with reference to alleged changes in the indictment without resubmission to the grand jury. Affirmed.

Frank vs. *Mangum,* 237 U. S. 309, in which this Court was asked to issue a writ of *habeas corpus* for the reason that the trial court had lost jurisdiction because of mob

domination; also for the reason that petitioner had been convicted without due process of law because the verdict was received in his absence, the supreme court of Georgia having held that petitioner's waiver of his right to be present when the verdict was received was valid.

The following is a summary of this case found in the case of *Filer* vs. *Steele,* 228 Fed. 242, 245 (affirmed *per curiam,* 241, U. S. 648):

> "First. Under the terms of section 753 of the Revised Statutes, in order to entitle the applicant to the relief sought under writ of habeas corpus, it must appear that he is held in custody in violation of the Constitution of the United States. Second. That he cannot have relief on habeas corpus if he is held in custody by reason of conviction upon a criminal charge before a court having jurisdiction over the subject-matter of the offense, the place where it was committed and the person of the prisoner. Third. Mere errors of law, however serious, committed by the court in the exercise of its jurisdiction, cannot be reviewed by habeas corpus. The writ cannot be employed as a substitute for a writ of error. Fourth. A criminal prosecution in the courts of a state, based on a law not repugnant to the federal Constitution and conducted according to the settled course of proceedings under the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process of law' in the constitutional sense. * * *"

McMicking vs. *Schields,* 238 U. S. 99, 106, 107. The trial court in the Philippine Islands refused defendant time to prepare for trial on a criminal charge, although the law provided for two days, if requested. The Supreme Court of the Philippine Islands discharged defendant on *habeas corpus.* Reversed. This Court says:

> "Mere errors in point of law, however sericus, committed by a criminal court in the exercise of its juris-

diction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. * * *"

Riddle vs. *Dyche,* 262 U. S. 333. This was an appeal from an order of the District Court of the United States for the Northern District of Georgia, refusing to release petitioner under a writ of *habeas corpus* from custody to which he had been committed, after conviction of a felony, by the District Court of the United States of the Northern District of Alabama. Affirmed.

The syllabus reads as follows:

"Habeas corpus will not lie to secure the release from custody of one convicted by a jury of less than twelve men where the record upon its face shows that a legal jury was empaneled, sworn, and charged, and no attempt was made to review the question by writ of error."

On pages 336, 337 this Court says:

"Whatever may be the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal,—one not acting in the exercise of appellate power."

Craig vs. *Hecht,* 263 U. S. 255, 277. Craig, being adjudged in contempt of court in a federal district court, instead of taking an appeal obtained his discharge on a writ of *habeas corpus.* Reversed and prisoner remanded.

United States vs. *Valante,* 264 U. S. 563, 564. Valante, having been convicted of a misdemeanor in a federal district court and no appeal having been taken, was discharged from custody on a writ of *habeas corpus* for the reason that the verdict was received and sentence imposed by a judge

other than the one who presided at the trial. Reversed. Writ discharged and prisoner remanded.

Matter of Spencer, 228 U. S. 652, 659, 660. The crime for which relator was detained was committed in 1910, at which time under the law of Pennsylvania an indeterminate sentence of imprisonment was provided with a maximum of two years and a minimum of not more than six months. In 1911 the law was changed so that the minimum sentence of imprisonment for this offense was eighteen months. Relator was tried in 1912 and sentenced under the Act of 1911 to imprisonment of not more than two years and not less than eighteen months. It was alleged that the Act of 1911 was an *ex post facto* law, and that relator had been deprived of due process of law as guaranteed under the Fourteenth Amendment. Writ discharged. Affirmed.

Urquhart v. *Brown,* 205 U. S. 179, 181, 183. Relator was committed by a state court without further trial or hearing upon a verdict of a jury that he was not guilty of a criminal charge by reason of insanity.

The principle of the rule applies as well after decision in the state courts as before.

Matter of Spencer, supra, 660.
Glasgow v. *Moyer,* 225 U. S. 420, 428.

(b) *Instant Case not Within Exceptions to the Rule.*

In *United States ex rel Kennedy* vs. *Tyler, supra,* This Court classifies the exceptions to the above rule as follows:

> "This general rule is emphasized by a consideration of the few cases where this court has upheld the allowance of the writ. They were all cases of exceptional urgency. Such, for example, were *In re Neagle,* 135 U. S. 1, where a deputy marshal of the United States was discharged on *habeas corpus* from state custody on a charge of homicide committed in the performance of his duty to guard and protect a justice of this court; *In re Loney,* 134 U. S. 372, where petitioner, charged with perjury in testimony given in a contested congres-

sional election case, was discharged upon the ground that to permit him to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal; and *Wildenhus's case,* 120 U. S. 1, where a member of the crew of a foreign merchant vessel was discharged from the custody of the state because the arrest was contrary to the provisions of an international treaty. Thus, it will be seen, two of these cases involved interferences by the state authorities with the operations of departments of the general government, and the other concerned the delicate relations of that government with a foreign nation."

In *Goto* vs. *Lane, supra,* 401, 402, this Court says with reference to this writ and the exceptions:

"* * * The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional, and usually confined to situations where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void.

"This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject-matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, * * * ; Ex parte Parks, 93 U. S. 18, 20, * * *; Ex parte Yarbrough, 110 U. S. 651, 654, * * *), but subject to correction in regular course on writ of error. If the questions pre-

> sented involved the application of constitutional principles, that alone did not alter the rule. Markuson *v.* Boucher, 175 U. S. 184, * * *. And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute. Riddle *v.* Dyche, 262 U. S. 333, * * *. And see Craig *v.* Hecht, 263 U. S. 255, ante, 293, * * *."

The instant case is clearly not within any of these exceptions. The reason given by the Court below for refusing to dismiss the writ and for discharging the prisoner is summed up in the following (R. 339, 340):

> "Jurisdiction of the subject-matter of the offense, the place where it was committed, and the person of the prisoner, the trial Court undoubtedly had. But this jurisdiction was lost by the denial of the prisoner's fundamental right to a separate trial before a separate jury on each indictment against him. Being thus denied that due process of law guaranteed to every citizen under the Constitution, it follows that the Court's proceedings and judgment against him, were null and void, and the relator is held in custody in violation of the Constitution of the United States."

Even if the Fourteenth Amendment does guarantee to relator a separate trial before a separate jury on each indictment against him, the denial of that right during the course of his trial did not constitute a loss of the jurisdiction of the trial Court over him or over either of the offenses charged. It constituted mere error in point of law, subject to correction in regular course on writ of error. The case does not for that reason come under any of the exceptions to the general rule that the writ of *habeas corpus* cannot be substituted for a writ of error.

In *United States* vs. *Valante, supra,* defendant contended that he had been denied his constitutional right to trial by

jury and attempted to raise that question on a writ of *habeas corpus.*

This Court says (p. 564):

> "* * * Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court, or render the judgment void, but was at the most, one which could have been corrected on a review by a writ of error. * * *"

In *Matter of Spencer, supra,* 661, this Court, without deciding whether or not the statute, under which sentence was imposed, was *ex post facto,* dismissed the petition for a writ of *habeas corpus,* on the ground that the proper course to pursue in raising the question was by appeal.

In *Glasgow* v. *Moyer,* 225 U. S. 420, 428, appellant sought discharge from confinement after sentence by a United States District Court on the ground, inter alia, that the statute under which he had been convicted was an *ex post facto* law, and that he had been deprived of his liberty without due process of law.

This Court held that even if such allegations be accepted as true he could not be discharged on writ of *habeas corpus* because those questions must be raised on writ of error.

Markuson v. *Boucher,* 175 U. S. 184, 185, 186, was an appeal from a United States District Court discharging a writ of *habeas corpus* issued on behalf of a person imprisoned under commitment by a state court.

The petition alleged that the statutes under which the prisoner was committed were in violation of the Fourteenth Amendment to the Constitution of the United States.

This Court, after reciting the fact that these constitutional questions had been argued at length, says:

> "We are not disposed to consider them. We have frequently pronounced against the review by *habeas corpus* of the judgments of the state courts in criminal cases, because some right under the Constitution of

> the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error."

Cited with approval in *Goto* v. *Lane, supra,* 402.

In *Ex parte Parks,* 93 U. S. 18, 23, a writ of *habeas corpus* was sought to discharge prisoner convicted of forgery in a United States Court because the act for which he was convicted was not a crime against the laws of the United States.

Held that whether the judgment was erroneous or not, it was not void because the trial court had jurisdiction and power to convict and sentence, and that, therefore, the writ could not issue to correct a mere error.

That the trial Court did not lose jurisdiction in the instant case by permitting the trial of realtor on the two indictments simultaneously is further illustrated by a consideration of the cases in which it has been held that judgments of trial courts were void and that, therefore, the writ of *habeas corpus* would lie.

In *Ex parte Lange,* 18 Wall. 163, the court undertook to impose a second punishment when it had exhausted its power in imposing one of the alternative penalties fixed by the applicable statute.

In *In re Snow,* 120 U. S. 274, the record disclosed that it was sought to impose a second punishment for the same offense.

In *Ex parte Bain,* 121 U. S. 1, the indictment had been amended without its re-submission to the grand jury.

In *In re Nielsen,* 131 U. S. 176, the court had exceeded its authority in undertaking to pass the particular sentence imposed.

In each of the four last cited cases the court from whose sentence the discharge was sought was either a United States Court or a territorial court.

In *Ex parte Siebold,* 100 U. S. 404, *Ex parte Royall,* 117 U. S. 241, and *Henry* v. *Henkel,* 235 U. S. 219, while the

writ was dismissed, this Court stated that where the offense charged is not such under the common law or a statute or where the statute under which sentence is imposed is unconstitutional the judgment may be reviewed on *habeas corpus.*

Frank v. *Mangum, supra,* and *Moore* v. *Dempsey,* 261 U. S. 86, involved an allegation that the trial court (a state court) had been dominated by a mob, and in each it was held that if such allegations were sustained by the evidence the trial court had lost jurisdiction for that reason and that, therefore, the writ of *habeas corpus* would lie.

The poverty of relator was alleged in the court below as a reason sustaining the writ in this case, but that does not create an exception to the rule.

> "Something is said in the opinion of the court below to the effect that the relators pleaded lack of ability to bear the expense of proceedings for their protection in the state courts or to furnish bonds required on appeal. We are unable to find anything in the record to support this claim, but even if it were true it would afford no basis for a different conclusion. *Markuson* v. *Boucher,* 175 U. S. 184, 185, 187."
>
> *United States ex rel. Kennedy* vs. *Tyler, supra.*

(c) *Reasons for Non-interference with State Courts.*

The reasons given by this Court for non-interference by the United States Courts under a writ of *habeas corpus* with the custody by the State Courts of one charged therein with crime, either before or after conviction, unless the case comes within some of the exceptions above noted, are as follows:

> "* * * It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal

court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, * * *."

United States ex rel. Drury v. *Lewis*, 200 U. S. 1, 7. *Urquhart* v. *Brown*, 205 U. S. 179, 183.

"* * * More than this, that for which petitioners contend, will make unstable and uncertain the administration of the criminal laws of the states. If defenses may be omitted at trials, rights of review omitted, and yet availed of through habeas corpus, the whole course of criminal justice will be deranged, and, it may be, defeated. * * *"

Matter of Spencer, supra, 660, 661.

These comments are particularly applicable in the instant case. The trial was reviewed first by the trial Court in Banc, consisting of three judges, and later by the Supreme Court of the State, consisting of seven judges, all of whom held that the trial, conviction and sentence were without error. The judgment of these ten judges, learned in the law, has been set at naught by one United States district judge and the Sovereign State of Pennsylvania has been deprived of its right to administer its criminal law and to enforce that law against this man, who has killed two of its citizens in cold blood.

We, therefore, submit that the State Court in which relator was committed had jurisdiction of the subject-matter and of his person, and the sentence imposed was not in excess of its power; that the offense was neither colorless nor an impossible one under the law; that nothing transpired during or since the trial which caused the trial Court to lose its jurisdiction over either the subject-matter or the person of relator; and that, therefore, the judgment of the Federal Court should be reversed, the writ of *habeas corpus* discharged and the prisoner remanded to the proper officials of the State of Pennsylvania for compliance with the sentence of its Courts.

2. DUE PROCESS OF LAW WITHIN THE TERMS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Court below has found that the trial of relator on two separate and distinct indictments before the same jury at the same time was unlawful according to the established law of Pennsylvania (R. 328-335), and that the State, in so trying him, denied to him the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 337-339.)

The correctness of these findings is raised by the sixth, seventh, ninth, eleventh, twelfth and thirteenth assignment of errors. (R. 342.)

In as much as the Supreme Court of Pennsylvania has decided that relator's trial was according to the established law of Pennsylvania and has affirmed the judgment (R. 233-236), we take it that that question is settled, unless such procedure was not due process of law as guaranteed by the Constitution of the United States, or unless in its application to his case relator was denied the equal protection of the law.

Bonner vs. *Gorman,* 213 U. S. 86, 91.

Kryger vs. *Wilson,* 242 U. S. 171, 176.

We contend that the trial and sentence of Joseph Valotta was according to law and in accord with the settled forms of criminal procedure within the Commonwealth of Pennsylvania, and that the defendant was accorded, in connection with his trial and sentence, all the rights guaranteed to him by the Constitution of the United States and the Constitution of Pennsylvania.

In the consideration of these questions we propose to discuss, first, due process of law within the terms of the Fourteenth Amendment with relation to procedural matters generally; second, whether or not the consolidation of indictments for separate and distinct felonies is prohibited as not constituting due process of law and thereunder

(a) the historical test; (b) the analytical test; and (c) the common practice of the people; and third, the application of the rules and practice, thus found to have been established, to the consolidation of the indictments in the instant case, and in connection therewith, the question of the equal protection of the laws.

(1) *Matters of Procedure are not Included within the Due Process Clause of the Constitution.*

A. General Rule.

> "Generally, whatever matters are jurisdictional are essential and protected by the Constitution; matters which do not affect the competency of the court are not jurisdictional and are not protected."
> *McGehee's Due Process of Law*, p. 165.

The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law.

The State has full control over the procedure in its courts, both in civil and in criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights.

> *Brown* vs. *New Jersey*, 175 U. S. 172, 175.
> *West* vs. *Louisiana*, 194 U. S. 258, 263.

In *Brown* vs. *New Jersey*, supra, the main question involved was the reduction of peremptory challenges under an Act providing for a struck jury. In *West* vs. *Louisiana*, supra, numerous questions were raised, including the admission of a deposition of an absent witness against the defendant in a criminal trial.

In the case of *Leeper* vs. *Texas*, *139 U. S. 462*, one of the errors assigned was the admission of testimony of other distinct offenses committed near the scene of the murder and immediately afterwards.

The Supreme Court says (page 467):

> "It must be regarded as settled. * * *. That by the

Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. * * *"

The United States Supreme Court has always declined to give a comprehensive definition of the phrase "due process of law", and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

Twining vs. *New Jersey*, 211 U. S. 78.

In determining whether or not any particular right as claimed is within the protection of the due process clause, two tests are to be applied: The first, the historical test—Was such a right brought to this country at the time of the immigration and applied and exercised by our forefathers up to the time of the revolution; the second, the analytical test—Has such right been continued and upheld by our courts as a continuing expression of the consciousness of the people, or has it been changed to meet the changing situation and circumstances in the development of the law?

Professor McGehee, in his *"Due Process of Law,"* treating of these tests, says (p. 57):

"But in the recognition of 'fundamental principles' apart from constitutional provisions, the courts, true to the method which has built up the common law, base their decisions less on deductive reasoning from *a*

> *priori* assumptions, than on the recognition of rights which have been asserted at a definite time and place against particular acts of tyranny and have become embedded in our law. * * *"

Speaking of the first test—Is the matter or practice under discussion found to be or not to be in the law and usage in England before the Declaration of Independence and in this country since it became a nation, in similar cases? Professor McGehee, on page 54, says:

> "If a particular procedure is found to have been sanctioned by English practice and adopted as suited to the conditions in this country, it measures up to the requisites of due process; but if the inquiry has only negative results, we must not immediately conclude that due process is wanting.
>
> "* * * To hold every procedure not fulfilling these requirements to be a deprivation of due process, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. * * *"
>
> Citing *Hurtado* vs. *Cal.*, 110 U. S. 516.

B. *Twining* vs. *New Jersey* and Preceding Cases.

In a consideration of cases to determine what is "due process of law" under the process of inclusion and exclusion, we start with *Twining* vs. *New Jersey, supra,* which contains a comprehensive review thereof.

In that case the question was: Is exemption from self-incrimination safeguarded as against state action by the due process clause of the Fourteenth Amendment?

In that opinion Mr. Justice Moody laid down three conclusions as follows (211 U. S. 79, 100, 101):

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their

civil and political condition by having been acted on by them after the settlement of this country. * * *

"Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' * * *

"Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right and guard him against the arbitrary action of government. * * *"

After showing that there is abundant evidence that the right of exemption from self-incrimination was not a part of the law of the land of England prior to the emigration to this country, the court states that it prefers to rest its decision on broader grounds than the first conclusion above stated "and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process," and proceeds (p. 1061):

"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of the citizen of such a government? * * * In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves

> by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. * * *"

In approaching the discussion of this question the following excerpts from the opinion of Mr. Justice Moody in this case of *Twining* vs. *New Jersey*, as found on page 106 of 211 U. S. are pertinent:

> "* * * We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations. * * *"

The opinion then proceeds (p. 110) to review cases dealing with this principle which must be observed in the trial of civil and criminal causes, first remarking that—

> "The decisions of this Court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. * * *"

The Court finds that due process requires that the court which assumes to determine the rights of parties shall have jurisdiction; that there shall be notice and opportunity for hearing given the parties; also that, subject to these

two fundamental conditions, the Court has sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. (P. 111.)

> "Among the most notable of these decisions are those sustaining the denial of jury trial, both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. * * *"

Justice Moody sums up the cases as follows (pp. 111, 112, 113):

> "* * * The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with. * * * It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed, the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in Hurtado *vs.* California and Maxwell *v.* Dow, was historically and in principle much stronger. * * *
>
> "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it can not be ranked with the right to hearing before

condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. * * *"

The following extracts supplement the references to adjudicated cases as found in *Twining* vs. *New Jersey,* supra:

In the case of *Holden* vs. *Hardy,* 169 U. S. 366, 384-388; the Court had under consideration the Constitutionality of a State law restricting the length of the day at which men could work in a coal mine to eight hours.

In a review of cases defining the Fourteenth Amendment, the Court says (pp. 384-388):

"* * * Thus in *Walker* v. *Sauvinet,* 92 U. S. 90, which was an action brought by a colored man against the keeper of a coffee-house in New Orleans for refusing him refreshments in violation of the Constitution of the state securing to the colored race equal rights and privileges in such cases, a statute of the state provided that such cases should be tried by jury, if either party demanded it, but if the jury failed to agree the case should be submitted to the judge, who should decide the same. It was held that a trial by jury was not a privilege or immunity of citizenship which the states were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings. 'Due process of law,' said Chief Justice Waite, 'is process due according to the law of the land. This process in the states is regulated by the law of the state.' This law was held not to be in conflict with the Constitution of the United States.

"Similar rulings with regard to the necessity of a jury, or of a judicial trial in special proceedings, were made in *Kennard* v. *Louisiana, Morgan,* 92 U. S. 480; *McMillan* v. *Anderson* 95 U. S. 37; *Davidson* v. *New Orleans,* 96 U. S. 97; *Walston* v. *Nevin,* 128 U. S. 578; *Ex parte Wall,* 107 U. S. 265.

"In *Hurtado* v. *California,* 110 U. S. 516, it was held that due process of law did not necessarily require an

indictment by a grand jury in a prosecution by a state for murder. The Constitution of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without an indictment by a grand jury, in the discretion of the legislature. It was held that conviction upon such an information, followed by sentence of death, was not illegal under the 14th Amendment.

"In *Hayes* v. *Missouri*, 120 U. S. 68, it was held that a statute of a state which provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it was allowed only eight peremptory challenges, did not deny to a person tried for murder, in a city containing over 100,000 inhabitants, the equal protection of the laws enjoined by the 14th Amendment, and that there was no error in refusing to limit the state's peremptory challenges to eight.

"In *Missouri P. Railway Co.* v. *Mackey*, 127 U. S. 205, it was said that a statute in Kansas abolishing the fellow-servant doctrine as applied to railway accidents, did not deny to railroads the equal protection of the laws, and was not in conflict with the 14th Amendment. The same ruling was made with reference to statutes requiring railways to erect and maintain fences and cattle guards, and make them liable in double the amount of damages claimed for the want of them.

"In *Hallinger* v. *Davis*, 146 U. S. 314, it was held that a state statute conferring upon an accused person the right to waive a trial by jury and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, was not a violation of the due process clause of the 14th Amendment.

"So, in *Re Kemmler*, 136 U. S. 436, it was held that the law providing for capital punishment by electricity was not repugnant to this Amendment. And in *Duncan* v. *Missouri*, 152 U. S. 377, it was said that the prescribing of different modes of procedure and the abolition

of courts, and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds persons accused of crime, are not considered within the constitutional inhibition. See also *Re Medley, Petitioner,* 134 U. S. 160, and *Holden* v. *Minnesota,* 137 U. S. 484.

"An examination of both these classes of cases under the 14th Amendment will demonstrate that, in passing upon the validity of state legislation under that Amendment, this court has not failed to recognize the fact that the law is to a certain extent a progressive science; that in some of the states methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes in this country, at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there.

"The present century has originated legal reforms of no less importance. The whole fabric of special pleadings, once thought to be necessary to the elimination of the real issue between the parties, has crumbled

to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed up a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the 14th Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado* v. *California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the char-

acter or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise.

"Similar views have been heretofore expressed by this court. Thus in the case of *Missouri* v. *Lewis,* 101 U. S. 22, 31 it was said by Mr. Justice Bradley: 'We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws, * * * The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same state'.

"The same subject was also elaborately discussed by Mr. Justice Matthews in delivering the opinion of this court in *Hurtado* v. *California,* 110 U. S. 516, 530: 'This flexibility and capacity for growth and adapta-

tion is the peculiar boast and excellence of the common law. * * * The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. * * *,"

A denial of due process of law cannot be founded on the admission of the deposition of an absent witness against the defendant in a criminal trial, although by the common law the evidence may be inadmissible.

West vs. *Louisiana,* 194 U. S. 258, 260, 261.

In *Leeper* vs. *Texas,* 139 U. S. 462, 467, 468, one of the errors assigned was the admission of testimony of other distinct offenses committed near the scene of the murder and immediately afterwards.

Held to be a matter to be determined by the State and not within the protection of the due process clause of the Fourteenth Amendment.

C. Cases Adjudicated since *Twining* vs. *New Jersey, Supra.*

Garland v. *Washington,* 232 U. S. 642, was in error to the Supreme Court of the State of Washington to review a judgment affirming a conviction of larceny. It appeared the defendant had been convicted upon an information charging the larceny of $1,000.00. A new trial was granted; a new information filed charging the larceny of "a check payable for the sum of $1,000.00 in money" upon which he was tried and convicted, but as to which it appeared he had not been arraigned or to which he had not pleaded. He raised these questions in general objections to the introduction of evidence, for the reason that he could not be tried on that information; but did not specifically raise the question of arraignment and plea.

Held that he had not been deprived of due process of law.

In the opinion by Justice Day the Court says (p. 645):

> "Due process of law * * * does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers *v.* Peck, 199 U. S. 425, 435, * * * and previous cases in this court there cited . Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. * * *"

Frank v. *Mangum*, 237 U. S. 309, 311, was an appeal from the District Court of the United States for the Northern District of Georgia to review a decree denying a petition for a writ of habeas corpus in behalf of one convicted in the State Court of first degree murder. The main reason advanced as error was based upon the contention that the trial court had been dominated by a mob to such an extent that it had lost jurisdiction.

But is was also contended that the relator had been denied due process of law, because the verdict had been received in his absence. The State Court had held that this right had been waived by him and that such waiver was valid (p. 316); also that he had failed to raise such question on his motion for a new trial and it was afterwards too late.

As to these later reasons this Court says (p. 326):

> "As to the 'due process of law' that is required by the 14th amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. * * *"

And with reference to the failure to include in his motion for new trial, his absence when the verdict was rendered, this Court says (pp. 339, 340):

> "* * * There is nothing in the 14th Amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure. * * *
>
> "* * * But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the 14th amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with. * * *"

In the *Matter of Walter Peterson,* 253 U. S. 300, 309, 310, the opinion states with reference to the 7th Amendment:

> "* * *That 'the (statement the) right of trial by jury shall be preserved' does not require that old forms of practice and procedure to be retained. * * * It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. * * * "

This was a case in the United States Courts involving the validity of an appointment of an auditor in an action at law, to simplify and clarify the issues and make tentative findings of fact.

Due process of law does not require a state to adopt any particular form of procedure, so long as it appears that accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.

Garland v. *Washington,* 232 U. S. 642.

(Want of formal arraignment in error to State court.)

D. Consolidation of Indictments—Historical Test.

(a) The English Rule.

Neither Magna Carta nor any of the other great charters included any provision for protection against the consolidation for trial of two or more indictments against the same defendant or against the joinder within the same indictment of two or more counts for separate and distinct offenses.

Chapter 39 of Magna Carta provides:

> "* * * 'No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.' * * *"

The main object of this chapter has been expressed as follows:

> "* * * '*It forbade him (John) for the future to place execution before judgment.*' McKechnie, Magna Carta, p. 439. * * *"
>
> *Taylor's Due Process of Law*, Sec. 4, pp. 4, 5.

In *Young* v. *Rex*, 3 T. R. 106, Buller, Justice, says that where different felonies are included in the same indictment, the judge may quash the indictment, lest it should confound the prisoner in his defense; but these are only matters of prudence or discretion.

> "In cases of felony, no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to

elect on which charge he will proceed." "But," the author adds, "this in only matter of prudence and discretion which it rests with the judges to exercise."

Chitty's Criminal Law. Vol. 1, pp. 252, 253.

"If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge, in his discretion may require the counsel for the prosecutor to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors."

Archbold, 8th ed., chap. 3, p. 95.

In *Roscoe's Criminal Evidence,* 8th Am. ed. 206, the author, after observing that there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender, and that such joinder was not a ground for arrest of judgment, says:

"In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment, or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed."

"* * * The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defense."

Erskine, J., in *Reg* v. *Trueman,* 8 Car. & P. 727.

The above extracts from *Young* v. *Rex, Chitty's Criminal Law, Archbold, Roscoe's Criminal Evidence* and *Reg.* v. *Trueman,* are taken from *Pointer* v. *United States,* 151 U. S. 396, 401, 402.

"* * * But every separate count charges the de-

fendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted: 1 Chit. Crim. L. 249. In point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender: Id. 253. * * *"

Campbell v. *State*, (Tenn. 1836) 9 Yerger, 333, 30 Am. Dec. 417.

These rules were rules of practice. Whether or not they should be applied in any particular case was within the sound discretion of the court. They did not belong to the due process of the law.

In summing up these common law rules Mr. Justice Harlan, in *Pointer* v. *United States*, supra. p. 403, says:

"* * * The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. * * *"

(b) The Rule as Adopted in this Country.

Our States, and indeed our Colonies, in adopting the common law of England, did not adopt all of its procedural requirements.

"Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others."

United States v. *Worrall, 2 Dallas 384.*

Even if protection against the consolidation of indict-

ments was developed in the common law of England, it was not incorporated in the various State Constitutions nor in the common law of the States in the broad sense of prohibiting such consolidation in a proper case. This seems to be established by the decision of Chief Justice Gibson in *Withers* vs. *Commonwealth*, 5 Sergeant & Rawle (Pa Supreme Ct.), p. 59 (1819), an authority on the common law at a time comparatively near the time of the adoption of the American Constitutions, holding that indictments for misdemeanors could be consolidated. His decision was based upon the fact that misdemeanors could be joined in several counts of the same indictment and that in the case of felonies, while the rule was that an indictment could be quashed or an election required upon motion for misjoinder where two or more felonies were combined in the same indictment, yet the matter was practically within the discretion of the trial court, no appeal lying to its refusal to quash or require an election.

In the case of *Withers* vs. *Commonwealth, supra,* Augustus Withers, plaintiff in error, and Joseph Withers were indicted in one indictment for conspiring against and cheating one Hickman, and the same defendants in the court below were indicted for conspiring against and cheating one William Thomas. These indictments were consolidated and tried by the same jury at the same time without the consent of the plaintiff in error and after he had expressly objected thereto.

It was argued by the Commonwealth that the combining of these two indictments was like combining two offenses in different counts of the same indictment, for which there were many authorities. (*Rex* vs. *Benfield,* 2 Burr, 984; 1 Hale's Pleas of the Crown, 560, 561; Cowp. 325; 1 Chitty's Criminal Law 296; 2 Hale 174. Also that in cases of felony it is a matter of prudence and discretion in the judges to admit several felonies to be charged in one indictment; that the evidence in these cases was applicable to each indictment, by way of corroboration, and to show the intent.

In sustaining the conviction at January Term, 1819, the Court, Gibson, J., says:

"I have found no case exactly like the present; but there is a strong analogy between it and those in which several counts for separate and distinct offenses are included in the same indictment: for these are necessarily tried together; and, in cases of misdemeanor, it has never been held that separate offenses could not be joined. As to felonies, a different rule prevails, and the Court goes so far as to quash where distinct offenses are charged; or if no motion for that purpose be made in time, to compel the prosecutor to select a particular offense, to which alone, the prisoner is held to answer. But in no case has such joinder been considered a cause of demurrer, or ground for a motion in arrest of judgment, but merely as a subject for the discretion of the Court, and, therefore, not a matter in which error could be assigned in a superior Court. The only solid reason for the distinction in regard to felonies, is, that the prisoner, having a right to challenge peremptorily, may choose to have a particular juror to try one of the offenses, and yet be altogether averse to him with regard to the other; and thus if the Court did not interefere, he would in some measure lose the benefit of his right. With us, this reason applies also to misdemeanors—as a defendant may peremptorily challenge four jurors; but whether a Court would therefore quash an indictment comprising two or more misdemeanors, would, I apprehend, depend on a sound exercise of discretion, having regard to the particular circumstances of each case: * * *. In the present case, the prisoner was allowed his challenges on each indictment, and has therefore no ground for complaint. But had it been otherwise, we could view these two charges only as if they had been included in the same indictment. It would therefore seem that the Court, by whom they were tried, were the only Judges of the proper exercise of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error. * * *"

The case of *Regina* vs. *Giddins, Car. & Mar.*, p. 634, as

cited by the Court below (R. 330-331), is not to the contrary of our position, as there the charge of robbing two men included in one count was sustained, there being no interval of time between the two crimes. In other words, they were very closely related as were the two murders in the instant case.

"These several charges, as laid in the indictment, are different modes of laying the same offence. But if the offences were different, separate offences, it is no objection either on demurrer or in arrest of judgment that separate offences of the same nature, are joined against the same defendant. Even in case of felony, though it be true that no more than one offence should regularly be charged, in one indictment, and that the Court would quash the indictment before plea or if on the trial, the Court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed, yet even in felonies, there is no objection to the insertion of several distinct offences of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer, or in arrest of judgment, and counts, where offences are of the same nature, counts at common law, and on a statute, may be joined, 1 *Chitty C. L.* 175. In misdemeanor, no objection can be made to joining several in the same indictment on any stage of the proceeding. 2 *Burr.* 984. * * *"

Commonwealth v. *Gillespie,* 7 Sergeant & Rawle's Rep. (Pa. Supreme Ct.), 469, 476 (1822).

"We think the authorities justify us in holding that two offenses, committed by the same person, may be included in the same indictment in different counts, where they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of the punishment are also the same, although they may be punishable with different degrees of severity: * * *."

Johnson v. *State,* 29 Ala. 62 (1856), 65 Am. Dec. 383.

"A defendant may be tried at the same time for different offenses, charged in the same indictment, if the offenses are of the same grade, and subject to the same punishment."

People v. *Gates*, 13 Wend. 311 (N. Y. 1835).

"* * * It has long been the practice in this Commonwealth to charge a defendant with various and distinct felonies in different counts of the same indictment, where they are of the same general nature, supported by similar evidence, and where the punishment to be awarded is of the same character. It is deemed that a defendant is sufficiently protected by the power which exists in the court to order separate trials upon the different counts, where there is, in its opinion, danger that a prisoner may be embarrassed in his defense. * * *"

Commonwealth v. *Mullen*, 150 Mass. 394, 23 N. E. 51, 52 (1890).

In this case the indictment contained two counts, each charging defendant as an accessory before the fact to two distinct burglaries.

E. Consolidation of Indictments—Analytical Test.

(a) In Pennsylvania.

We have shown that in England, prior to the Revolution, while a rule of practice had developed against the consolidation for trial of two or more indictments, whether the alleged offenses were felonies or misdemeanors, and against the inclusion of two or more offenses in different counts of the same indictment, whether of felonies or misdemeanors, this rule was subject to the sound discretion of the trial court. Also that none of these rules have been incorporated in Magna Carta or any of the other great charters, nor does it appear that they had been incorporated in any statute.

We have shown that in this country this rule of practice

had not been adopted so far as concerned the inclusion of several counts for separate and distinct misdemeanors in one indictment nor so far as concerned the consolidation for trial of two or more indictments against the same defendant or defendants charging separate and distinct misdemeanors.

Also that this common law rule of practice with regard to the joinder of separate and distinct felonies in different counts of the same indictment was adopted as a general rule subject to its modification by the trial court in the exercise of a sound discretion, such joinder never having been considered a cause of demurrer or ground for a motion in arrest of judgment or a matter in which error could be assigned. By analogy with the rules as to misdemeanors this rule, with reference to the joinder in one indictment of several counts charging felonies, applied also to the consolidation for trial of two or more indictments against the same defendant or defendants charging separate and distinct felonies.

In the case of *Withers vs. Commonwealth, supra* (1819), the consolidation for trial of two indictments against the same defendant, each charging a misdemeanor, was sustained.

In *Commonwealth* vs. *Hand,* 3 Philadelphia Reports (Pa.) 403, 405 (1859), defendant was tried and convicted on an indictment charging two distinct felonies. Motion in arrest of judgment overruled. The court says:

> "Upon the point taken of the joinder of two distinct felonies in one indictment, it is sufficient to say, that the defendant pleaded to the indictment without objection, and that he did not require the Commonwealth to elect upon which count they would proceed to trial. This is apart from the question as to whether the offence is not substantially one crime, * * *."

This case was in the Quarter Sessions Court of Philadelphia County and was not removed to any appellate court.

In the case of *Henwood* vs. *Commonwealth,* 52 Pa. 424

(1866), an indictment containing one count charging larceny, a felony, one count charging larceny by bailee, a misdemeanor, and one count for conspiracy to defraud, a misdemeanor, was sustained. The court, Agnew, J., says:

> "The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offences are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage: * * *."

In the case of *Commonwealth* vs. *Dupes*, 14 Pa. County Court Rep. 238 (1894), defendant was indicted for the felonious entry of certain railroad cars and larceny therefrom. At another number of the same sessions he was indicted for the felonious entry of a store-room of one, Detweiler, and larceny therefrom. At another number of the same sessions he was indicted for the felonious entry of the house of one, Fetter, and larceny therefrom. At another number of the same sessions he was indicted for the larceny of goods of the Grand Union Tea Company. All of these offenses were committed at about the same time. He was tried on the four indictments at the same time and was convicted on each indictment. Objection to the trial of the four distinct offenses at the same time was made by counsel for defendant upon motion for a new trial for the reason that "defendant was not allowed his right to a separate trial for each distinct offense". Motion overruled without opinion filed.

This proceedings was in the Court of Dauphin County, and the case was not appealed to any appellate court.

In the case of *Commonwealth* vs. *Wheeler*, 75 Pa. Superior Ct. 84, 87, 88 (1920), the consolidation for trial of two indictments against defendant was sustained. Each indictment charged a different offense, each offense charged was a misdemeanor and grew out of the same course of employment.

The action of the court in ordering both indictments to be tried together was assigned as error. The court held that the matter was to be determined by the court below in the exercise of a sound discretion.

In the case of *Commonwealth* vs. *Brown,* 264 Pa. 85, in an opinion filed March 10, 1919, the Supreme Court of Pennsylvania sustained the consolidation of two indictments for murder against the same defendant for the killing of two people, growing out of connected acts, as proper procedure. Brown, having broken into a store at night, was discovered by one, Elford, who, with a policeman, was attempting to force a way into the store, when two shots were fired therefrom, one of which struck and killed Elford and the other struck and killed the policeman. Two indictments were returned against Brown, one charging the murder of Elford, the other the murder of the policeman. These two indictments were consolidated and tried before the same jury. A verdict of guilty of murder in the first degree was returned in the one, and a verdict of murder in the second degree was returned in the other. Defendant was sentenced to electrocution on the former.

In the instant case the Supreme Court of Pennsylvania approved the procedure followed in the trial Court as in accord with the law of Pennsylvania (R. 233) therein citing with approval, as an authority in point on this very subject, the case of *Commonwealth* vs. *Brown, supra.*

The Court below (R. 334), differing with the Supreme Court of Pennsylvania, states that the *Brown case* is not an authority in the Valotta case. We submit that the Supreme Court of Pennsylvania is best qualified to interpret its own decisions, and that the similarity between the facts of the *Brown case* and those of the Valotta case is apparent.

In the case of *Commonwealth* vs. *Fembleaux,* 37 Lancaster Law Review (Pa.) 489 (1921), the defendant was tried simultaneously on two indictments, one of which charged larceny, a felony, and the other charged felonious entry, a felony. He was convicted on one and acquitted on the other. Objection was made by him before the jury was

sworn to his trial on both indictments at the same time. Rule for a new trial discharged. The court holds that it is within the discretion of the trial court to try a defendant on two indictments at the same time.

The practice followed in the instant case finds support in the following California cases:

This case was in the Quarter Sessions Court of Lancaster County, Pennsylvania, and was not appealed.

Under Pen. Code, Sec. 954, authorizing consolidation of two or more prosecutions of the same class, the court did not abuse its discretion in consolidating and trying at the same time two prosecutions for grand larceny, though committed more than one year apart.

People v. *Feigelman,* 223 Pac. 579.

In *People* v. *Potigian* 231 Pac. 593 (Cal. app.) Held consolidation two murder indictments against same defendant each charging murder of a different person is within sound discretion of the trial Court under Sec. 954 Pen. Code. In this case the two indictments were consolidated for trial and jury sworn. Immediately after jury sworn the Court directed the trial to proceed under one indictment only, which was done.

The order of consolidation assigned as error. Verdict of guilty affirmed.

Entirely too much reliance is placed by the Court below on certain provisions of the Pennsylvania Crimes Act of 1860 as proving that, under the law of Pennsylvania, distinct and separate offenses, even though closely related, could be joined in one indictment only as specified by statute. (R. 332.)

It is to be noted that the felony and misdemeanors joined in *Henwood* vs. *Commonwealth, supra,* were not included in the provisions of the Crimes Act of 1860 nor was there any statutory authority for such joinder.

The provision in the Crimes Act of 1860 for the joinder of *distinct* acts of embezzlement committed against the same master within the *period of six months* has no relation to the joinder of offenses which are closely related or connected

together, as the murders in the instant case, or to the consolidation for trial of such closely related offenses.

Members of the Bar of Pennsylvania testified that the practice here under consideration was unknown to them. (R. 250-292.) The purpose of this evidence seems to have been to prove what is the common law and practice of Pennsylvania, and the Court below finds that the practice contended for has no support in long established practice. (R. 335.)

This evidence was rebutted by four witnesses, all of whom had been connected with the office of the District Attorney at Pittsburgh in Allegheny County for many years, two of whom were common pleas judges in that county. (R. 295-308.) Judge Haymaker, out of an experience of thirty years in the District Attorney's office and on the bench, stated that where a defendant has been arraigned on two or three separate indictments, including murder indictments, if he does not elect to be tried upon one and there is no objection upon the part of his counsel, the practice has always obtained that he is tried upon all of the indictments at one time. (R. 305.)

However, the best proof of what is the common law of a State or of what is the authorized practice in its courts is to be found in the decisions of its highest court. The Supreme Court of Pennsylvania, in the case of *Commonwealth* vs. *Brown, supra,* and in its affirmance of the judgment in the Valotta case has approved the practice here complained of as being, under the facts of this case, proper practice in, and in accordance with, the law of Pennsylvania. How can individual members of the bar be permitted to prove the contrary? How can a United States Court, upon conflicting evidence, reverse the Supreme Court of the State upon what is or is not the established practice within that State?

The Federal Supreme Court will accept as conclusive the interpretation of the State Constitution and the conformity of legislation thereto.

Hunter vs. *Pittsburgh,* 207 U. S. 161, 176.

Also as to the existence of rights under the common law and the incidents thereto.

Marshall vs. *People of New York,* 254 U. S. 380, 385.
Bonner vs. *Gorman,* supra.
Kryger vs. *Wilson,* supra.

We do not understand that any question of the equal protection of the law arises in this case, but in anticipation of any such argument desire at this point to suggest that this rule of practice, being approved by the Pennsylvania Courts, would be applied to every case arising under similar facts, at the discretion of the District Attorney and the trial Court.

Equal protection of the laws is not denied by a law or course of procedure which would have been applied to any other person in the State under similar circumstances and conditions.

Tinsley vs. *Anderson,* 171 U. S. 101.

If a classification relating to the operation of a criminal statute is not arbitrary but based upon valid reasons and distinctions, it is not invalid as denying the equal protection of the laws.

Finley vs. *California,* 222 U. S. 28.
Hayes vs. *Missouri,* 120 U. S. 68.
Bowman vs. *Lewis,* 101 U. S. 22, 31,
Brown vs. *New Jersey,* 175 U. S. 172.

(b) In the United States Courts.

In the Federal practice the consolidation of indictments is governed by the Act of February 26, 1853, c. 80, Sec. 1, 10 Stat. 162, Comp. Stat., Sec. 1690 (R. S. Sec. 1024), which is as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined

in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

It is not intended by the phrase "which may be properly joined" as used in this section to limit the joinder or consolidation to charges which might have been joined at common law, but merely to vest the trial Court with the discretion to refuse to permit a joinder or consolidation where it would prevent a fair trial or be unjust to the defendant.

Dolan vs. *United States,* (1904) 133 Fed. 440, 69 C. C. A. 274.

In *Pointer* vs. *United States,* 151 U. S. 396, 398-404 (1894), an appeal from a United States Circuit Court, defendant was tried for murder on an indictment containing two counts, each charging the murder of a different person. He moved to quash the indictment on the ground that it charged two distinct felonies and moved that the District Attorney be required to elect on which count he would claim a conviction, both of which motions were overruled. After the evidence was in he revived his motion to require the District Attorney to elect, which was overruled. He was convicted of murder on each count, two verdicts being rendered.

This Court states that the question presented on the appeal was "whether two distinct charges of murder can properly be embraced in one indictment".

The opinion proceeds to state that, while the defendant must not be embarrassed in his defense by a multiplicity of charges to be tried by one jury, the joinder in one indictment, in separate counts, of different felonies of the same class and grade and punishment is in the sound discretion of the Court.

In that case the "two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other". The three men were in

company together and the killing of one immediately preceded the killing of the other, so closely, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other.

The judgment was affirmed.

In *Logan* vs. *United States,* 144 U. S. 263, 295 (1892), four defendants were indicted under four separate indictments. The first indictment, in the first count, charged the defendants (a) with a conspiracy to injure and oppress citizens of the United States in the free exercise and enjoyment of the right to be secure from assault or bodily harm and to be protected against unlawful violence while in the lawful custody of a marshal of the United States, and (b) with the murder of E. Marlow in the prosecution of said conspiracy. Other counts in this indictment were substantially similar to the first except that some of them alleged A. Marlow to have been the person murdered.

The other three indictments were similar to the first (pp. 265-266).

Five other indictments had previously been returned against some of the same defendants and others, the counts being similar to the first count of the four indictments specified (p. 267).

These nine indictments were consolidated for trial to which consolidation the defendants excepted (pp. 265-266).

Subsequently, the order of consolidation of indictments was set aside so far as to separate the five earlier indictments and the consolidation of the other four was confirmed, to which order no exception was taken (p. 266). Upon trial some of defendants were acquitted and the jury, disagreeing as to others, was discharged.

Subsequently an additional indictment, including additional defendants, and charging the same conspiracy and same murder as charged in the preceding four indictments, was consolidated with said four indictments, without exception by defendants (p. 270). Upon this re-consolidated indictment defendants were tried, some were found guilty of the conspiracy charged and not guilty of murder, the others were acquitted (pp. 275-276).

These indictments resulted from an attempt made to

take the two Marlows and others from the custody of the United States Marshal during the course of which the two Marlows were killed (pp. 272-274).

On appeal to this Court it was held (p. 296) that objection to the consolidation of the indictments could not prevail.

This Court says:

> "* * * the four indictments, * * * were charges against the same persons 'for the same act or transaction,' or, at least, 'for two or more acts or transactions connected together,' and therefore within the very terms and purpose of the section of the Revised Statutes above quoted, and might perhaps have been ordered, in the discretion of the court, to be tried together, independently of any statute upon the subject. See *United States* v. *Yarbrough*, 110 U. S. 651, 655; *United States* v. *Marchant*, 25 U. S. 12 Wheat. 480; *Withers* v. *Com.* 5 Serg. & R. 59. And to this order no exception was taken.
>
> "By the third order of consolidation, indeed, made at February term, 1891, shortly before the trial, a new indictment against different persons for the same crime was consolidated with the four indictments. But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict."

Ex Parte Yarbrough, 110 U. S. 651, was a petition for a writ of *habeas corpus* to discharge relators from confinement after conviction in a United States Court of a conspiracy to prevent by force etc. certain citizens, lawfully entitled to vote, from voting for members of Congress.

The indictments, four in number, on which petitioners

were tried, charge, in each one, all of the defendants with a conspiracy as above indicated, directed against a different person in each indictment. These four indictments were consolidated for trial.

Petition for writ denied.

It appears that a practice similar to that followed in the instant case was followed in the United States Federal Court for the Eastern District of Texas, as appears from the opinion in the case of *Hotema* vs. *United States,* 186 U. S. 413, 421, 422, where the defendant's special plea of former jeopardy was overruled.

Defendant was indicted for the murder of Coleman and the opinion of the Supreme Court sets out that it appeared, in the plea of former jeopardy, that the defendant on the same day on which he killed Coleman also killed two other persons, and that two indictments were found charging defendant with the murder of each of such persons; that the indictments were thereupon consolidated for trial; that upon his trial on the consolidated indictments the defense set up was insanity; and that he was found not guilty by reason of insanity.

The indictment in the case under review was for the killing by the defendant of the third of the three persons, and it was upon these facts that he set up the plea of once in jeopardy.

In this manner this consolidation of two indictments charging the same defendant with the murder of two different persons came to the attention of the United States Supreme Court, and although the practice was not assigned as error, it was passed by without any adverse comment.

In *Williams* vs. *United States,* 168 U. S. 382, the consolidation of indictments for extortion in exacting money from divers Chinese immigrants at various times for permission to land and remain within the United States sustained.

Consolidation of indictments for stealing letters from a post office at various times sustained.

United States vs. *Brent,* Fed. Cas. No. 14640.

Two counts, each charging the same defendants with the burning of a different building, may be joined in an indictment for arson.

United States vs. *Cardish,* (D. C. 1906) 145 Fed. 242.

Separate indictments against the same persons each charging them with having aided and abetted a different person in using a false certificate of citizenship as evidence of a right to vote, charge acts or transactions connected together, and may properly be consolidated.

Dolan vs. *United States,* supra.

Such an uncertain rule of practice, so safeguarded, cannot be held to be a fundamental right or a fundamental principle of "liberty and justice inherent in the very idea of free government", one to be rated "as an immutable principle of justice which is the inalienable possession of every citizen of a free government" to be "ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property."

Federal Consolidation Act affected.

It may be observed that if the right to a separate trial before a separate jury upon each of several indictments charging the murder of different persons is guaranteed by the due process clause of the Fourteenth Amendment to every defendant in a State court, then such right is guaranteed to every defendant in a United States Court under the due process clause of the Fifth Amendment. If that be true then the right must be applied to all cases in which such charges are of felonies other than murder because there never has been any distinction made, in respect to these matters, as between felonies. Indeed it is doubtful if, under the English common law, any distinction was made in this respect as between felonies and misdemeanors.

If the lower Court's position is here affirmed little practical value will remain in the Act of Congress relating to the consolidation of indictments.

F. The Common Practice of the People.

Taylor in Due Process of Law, Section 20, page 51, quotes with approval the statement of Savigny that instead of considering law as the creation of the will of individuals, he regarded it as the natural outcome of the consciousness of the people, like their social habits or their language.

Mr. Justice Moody in *Twining* vs. *New Jersey,* (supra, p. 113), in connection with his comment that "it would be going far to rate it (privilege against self incrimination) as an immutable principle of justice which is the inalienable possession of every citizen of a free government", adds "it is nowhere observed among our own people in the search for truth outside the administration of the law."

We take it that what is meant by these expressions is that our people, in the search for the truth of a charge against a person, universally want to know what the accused has to say about the matter, expect him to speak concerning it and construe his silence as an admission of guilt.

Certainly the people in determining the guilt or innocence of one charged with two murders closely related in time and place and circumstances desire and expect to know the facts of each in determining the truth of the charge in the other.

This is particularly true in case there is no denial of the killing under either charge and the only question involved in either is one of intent.

Such is the instant case. In determining the intent of Valotta in killing Couch, his pursuer, the facts of the killing of Hopkins are necessarily involved. How else can motive be determined—why did he shoot with every apparent intent to kill his pursuer? was it not because he had just committed a murder and was fleeing? The former homicide and the flight are essential in determining motive. This fact becomes more apparent when it appears that his pursuer was an officer of the law and the jury has found, as is evident from the verdict, that he knew such fact.

The same is true with respect to the killing of Hopkins. He claimed it was done in self-defense. If so, why should

he kill a pursuing officer? The fact that he did so is strong evidence that he did not kill Hopkins in self-defense.

The people in the consideration of each of these cases would demand to know and knowing, would consider, the facts in connection with the other.

(2) *Application of above Rules to Consolidation of the Indictment in the Valotta Case.*

The consolidation for trial before one jury of the indictment charging Valotta with the murder of Hopkins with that charging him with the murder of Couch was a matter of procedure in connection with a jury trial within the sound discretion of the trial Court, a matter for State regulation entirely unaffected by the Federal Constitution, under the foregoing authorities (*Frank* vs. *Mangum and Garland* vs. *Washington*, pp. 34, 35, this brief), unless such consolidation constituted a denial of fundamental rights (*Brown* vs. *New Jersey*, p. 22, this brief) or a fundamental principle of liberty and justice inherent in the very idea of free government (*Twining* vs. *New Jersey*, p. 27, this brief).

This was not a case of the introduction into the trial of one offense, of evidence tending to establish the commission of an entirely distinct, different and separate crime. It is the introduction of evidence of "two or more acts or transactions connected together" (words of the Federal Consolidation Act, p. 48, supra). The killing of Couch cannot be adequately described without detailing the facts surrounding the killing of Hopkins. If Valotta had been tried separately on these indictments, the evidence relating to the other would have been admissible in each; in the Couch case for the purpose of showing motive and intent; in the Hopkins case as negativing the self-defense theory. Each jury would have known all the facts in the other case. Then how can it be found that this consolidation constituted the denial of fundamental rights or the denial of a fundamental principle of liberty and justice inherent in the very idea of free government?

Historical Test.—Negative proof that "due process of

law", as the term was understood and applied in England prior to the Revolution, did not prohibit the consolidation for trial of indictments, against the same defendant, charging separate and distinct offenses, is found in the fact that no provision against the same is found in any of the great charters or in any statute.

Positive proof that it did not prohibit such practice is found in the fact that it was merely a rule of practice and, in the unanimity of the authorities, that the matter was within the prudence and discretion of the judge (pp. 36-38 supra). Also in the fact that the authorities show the rule was adopted in this country in a very limited way, always within the discretion of the trial Court; and that the joinder of such separate and distinct offenses in different counts in one indictment was not ground for demurrer or arrest of judgment and that the exercise of discretion by the trial Court on a motion to quash or to require an election was not subject to review (pp. 39-41, supra).

Fundamental rights and fundamental principles of liberty and justice inherent in the very idea of free government are given more positive protection than this. Rules of practice that remain so uncertain and are to be applied by the trial Judge within his discretion, dependent upon the facts of the case as they develop, cannot be considered as within such fundamental rights and principles.

Analytical Test.—Negative proof that such consolidation of indictments was not prohibited by the due process clause is found in a general way in the fact that the Supreme Court of the United States has sustained all State laws, statutory or judicially declared, which have come before it, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law (*Twining* vs. *New Jersey*, p. 27, this brief). Also in the fact that such Court has held that the due process clause of the Federal Constitution did not prohibit the States from denying trial by jury; from the substitution of informations for indictments; from the enactment that the possession of policy slips raises the presumption of illegality; from admitting the deposition of an absent witness in a criminal case (p. 27, supra); from inflicting capital punishment by

electricity; admitting the testimony of other distinct offenses committed near the scene of a murder and immediately afterwards (p. 29, 33, supra); from dispensing with formal arraignment or plea (p. 33, supra); or from permitting the defendant to waive his right to be present at all stages of a trial for felony (p. 34, supra).

Proof is found in a positive way in the Federal Consolidation Act; and from the fact that under that Act this Court has affirmed the consolidation of several indictments charging the murder of two persons; of indictments charging conspiracy each directed against a different person (pp. 49-50, supra).

It also appears that in the Federal District Courts consolidations have been sustained of indictments each charging the murder of a different person; indictments charging extortion from divers persons at different times; and that in one of such courts an indictment was sustained containing two counts each charging arson directed against different buildings (pp. 52, 53, supra).

Finally—what was done here in the administration of the law was exactly what our people would do in the search for truth as to the guilt and the degree of guilt of this defendant—consider the evidence in the other homicide in arriving at a verdict in each, where the two are so closely related in time, place and circumstances.

All the requirements of due process of law as laid down by this Court are found in this case—jurisdiction in the trial Court, notice to the defendant and an opportunity to be heard (pp. 9, 15, 27, supra), and we submit that the deant was not deprived of any of his constitutional rights and that, therefore, the judgment of the lower Court should be reversed, the writ dismissed and the prisoner remanded.

(3) *Defendant Having Consented to be Tried Simultaneously on the Two Indictments is Bound by Such Waiver.*

The Supreme Court in its opinion affirming the judgment in this case says:

"The fifth attack made on the integrity of the ver-

> dict is that it was improper to try the defendant upon the two indictments at the same time. The record shows that he made no objection to be thus tried. Assuming, but not deciding, that notwithstanding his failure to object on trial, he can now be heard to raise this question, the simultaneous trial on two indictments charging murder is warranted * * *."

The Court below held that the defendant could not consent to be so tried. (R. 335-337.).

This question was raised under the twelfth and thirteenth assignments of error.

We know of no additional authorities on this subject in this State, except the case of *Commonwealth* vs. *Hand, supra* (p. 43, this brief).

In *Logan* vs. *United States*, (p. 50, supra), speaking of a consolidation of indictments, each charging conspiracy and each the murder of two persons, appears the following (pp. 296, 297):

> "* * * But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict."

In *Frank* vs. *Mangum*, 237 U. S. 309, 338, the defendant on trial for murder was absent at the time of rendition of the verdict. Upon waiver by his counsel of his right to be present the verdict of guilty was received. This Court held that the prisoner's right to be present at all stages of the trial was not such an incident of due process of law that could not be waived.

Defendants who interposed no objection to the consolida-

tion of indictments when made cannot object for the first time after judgment.

Haynes vs. *United States,* (1900) 101 Fed. 817, 42, C. C. A. 34.

A defendant not objecting to the consolidation for trial of separate indictments must be deemed to have waived the irregularity.

Silvie v. *State,* 173, S. W. 857, 117 Ark. 108.

(4) *Absence of Specific Order of Consolidation— Deprivation of Challenges.*

(a) Consolidation.

The Court below finds that the record of the trial Court did not disclose that there was any offer by the Commonwealth, or any order of the Court, to consolidate the indictments; any consideration by the Court as to the right or the propriety of trying the cases together; any exercise of discretion by the Court in relation thereto; any putting of the Commonwealth to an election as to which case it would try; any suggestion to the defendant as to his right to a separate trial; any consent on the behalf of the defendant or his counsel, to a joint trial on the two indictments; or any notice to the defendant of his right to twenty peremptory challenges under each indictment. (R. 326, 327.)

The propriety of this finding is raised by the fourth and fifth assignments of error.

Consolidation of indictments in Pennsylvania is not governed by statute. The District Attorney decides the order in which cases shall be called for trial, subject to the approval of the Court. In this case the usual practice was followed. The prisoner was arraigned on one indictment and issue joined, and immediately thereafter he was arraigned on the other and issue joined. The selection of the jury to try the two cases then proceeded, and it was sworn in each case.

There was no question but what the prisoner and his counsel knew and understood what was being done, and there is no doubt but what they preferred to take chances before one jury only rather than before two.

If defendant, through his counsel, had objected to this proceeding, he had ample opportunity to raise the question prior to the receipt of the verdict. The record is silent as to whether or not the defendant or his counsel specifically assented to this simultaneous trial of the two indictments.

However, under the authorities the question is not when an order of consolidation was made or when the Court finally exercised its discretion with regard to the propriety of such consolidation, but the question is whether or not the trial Court did, in the exercise of a sound discretion, approve the consolidation.

The question of the propriety of the consolidation of the indictments in this case has been decided against the defendant and appellee by the Judge who tried the case, and by the Judges of the trial Court in Banc and by the Supreme Court of Pennsylvania.

The question here for review is the action of the State of Pennsylvania, which is finally determined after the action of the Court of last resort.

Frank vs. *Mangum, supra.*

The trial Court does not abuse its discretion in overruling a defendant's motion to require an election by the Government between two charges of murder where the indictment was that the two murders were committed on the same day and at the same place. The discretion of the Court may best be exercised at the conclusion of the evidence.

Pointer vs. *U. S.*, 151 U. S. 396, 403, 404.

Held three indictments charging conspiracy in use of the mails could in the discretion of the court be tried together even though not formerly consolidated. Citing *Logan* v. *U. S.*, 144 U. S. 263, 306, and *Pointer* v. *U. S.*, 151 U. S. 396, 403.

Brown vs. *United States*, 143 Fed. 60, 66, 74, C. C. A. 214.

(b) Deprivation of Challenges.

The law of Pennsylvania authorizes twenty peremptory challenges in a murder trial. In the selection of the jury in the instant case the defendant did not exhaust his twenty peremptory challenges. (R. 11)

We contend that the right to any specific number of peremptory challenges is in no sense a vested right and is not within the protection of the due process clause of either the Federal or State Constitution, and we contend further that it is strictly a State question.

In *Brown* vs. *New Jersey*, 175 U. S. 172, it was held that a State statute providing for struck juries in certain cases, in which the number of peremptory challenges is five instead of twenty, as allowed in a trial before an ordinary jury, is not unconstitutional as violating the due process clause of the Federal Constitution.

In that case Mr. Justice Brewer says (pp. 175, 178):

> "In providing for a trial by a struck jury, * * * no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. * * *
>
> "* * * Either party, state or defendant, may apply for a struck jury, and the matter is one which is determined by the court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. * * * That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more."

Inasmuch as the right of trial by jury in a State Court is not guaranteed under the Federal Constitution (*Walker* vs. *Sauvinet*, 92 U. S. 90; *Hurtado* vs. *California*, 110 U. S. 516, 535; *Maxwell* vs. *Dow*, 176 U. S. 581, 602), there can be no

vested right in a defendant with respect to the number of jurors or the method under which they are selected or the number of challenges allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NO. 521 OCTOBER TERM, 1925.

STANLEY P. ASHE, Warden of the State Penitentiary for the Western District of Pennsylvania, Plaintiff-in-Error,

VS.

UNITED STATES OF AMERICA, ex. rel. Joseph Valotta, Defendant-in-Error.

BRIEF FOR APPELLEE.

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I.

Opinions of the Courts Below.

The opinions delivered by the courts below in this case are reported in 2 Federal (2d) 735 and 279 Pa., 84.

II.

Statement of Grounds on Which Jurisdiction Invoked.

(1) The judgment of the court here appealed from was rendered December 19, 1924 (R-340), and the appeal was allowed on January 5, 1925 (R-341).

(2) Upon a writ of *habeas corpus* to discharge relator from custody of a state officer, who detained him by virtue of process issued out of a state court, based upon conviction of murder, relator claimed that he had been denied his right to due process of law and to the equal protection of the law as guaranteed under the Fourteenth Amendment to the Constitution of the United States as follows, (R-6 and 7):

(a)) No evidence to sustain a verdict of murder in the first degree.

(b)) By the trial of two separate indictments for two separate murders before one jury in the manner particularly set forth.

(c)) By depriving relator of the right of peremptory challenges under each indictment.

(d) By depriving relator of his rights under Act of Assembly of the Commonwealth of Pennsylvania of March 15, 1911, P. L. 20, prohibiting the questioning of defendant in regard to other crimes charged.

(e)) By depriving relator of his right to be tried on each indictment by an impartial jury.

(f) By depriving relator of his right to trial by jury of his peers.

(g) Omitted.

(h) Omitted.

(i) The proceedings against relator were not conducted according to the settled course of judicial proceedings as established by the law of Pennsylvania.

(j) The criminal prosecution of relator was not according to the established modes of procedure in Pennsylvania.

(k) The procedure adopted by the Court was in violation of Article I, Section 9 of the Constitution of Pennsylvania, prohibiting conviction, except by judgment of defendant's peers or the law of the land.

(l) Omitted.

(m) The proceedings were in violation of the Act of March 31, 1860, Section 25 of the statutes of Pennsylvania P. L. 427, prohibiting the trial of more than one indictment in felonies.

(n) The said Court by proceeding as herein set forth, lost its jurisdiction and its judgment and sentence are wholly void.

RULINGS MADE

The lower court sustained the relator's claims and discharged him (R. 332-340).

(3) The jurisdiction of this Court on appeal is invoked under Section 238 of the Judicial Code as amended, Act of Congress Jan. 28, 1915, C. 22, Sec. 2, 38 Stat. 803, Comp. Stat. Sec. 1215.

> "Appeals and writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States * * *."
>
> *Moore vs. Dempsey,* 261 U. S., 86.

III.

Statement of the Case.

At the time of the trial Joe Valotta had lived in this country for twenty-two years. He had been working in the railroad shops of the Pennsylvania Railroad, North Side, Pittsburgh, for seven years (R-140). He had never had any trouble and had a good reputation among former employers and neighbors (R., 165-181). In the summer of 1922 the railroad union called a shopmen's strike. Valotta did not go out with the strikers. The usual incidents of such a strike occurred. City and state police were on guard. The shops were picketed by strikers. Assaults were made on workers. For a part of the time they were escorted from their homes to their work and back by policemen (R., 144, 158, 163). Valotta having been personally threatened and having heard that a brother workman had his eye gouged out by a striker, purchased a revolver from a uniformed police officer for his protection (R., 140, 141, 145). His home was immediately behind the shops. From the first of August until the thirtieth of October Valotta at the close of his work ran to his home and did not leave it until he came to work the next morning (R., 145). He was afraid of assault. On Sunday, October 29, the situation had quieted down to the extent that he felt he could risk going out in the evening to visit a friend. He took the gun with him. Valotta left the home of his friend about eleven o'clock to go to a christening (R., 97) and was returning home at one o'clock Monday morning.

His route lay through Freedmore Street. Freedmore Street is one block long, running between Irwin Ave. and Brighton Road, which is intersected by an alley, and an electric light was over the street at the

intersection. The night was so dark that at a distance of ten or fifteen feet one could not recognize a friend (R., 49). The streets were deserted.

When about fifteen feet from the corner of Freedmore and Irwin, Valotta saw four men standing on the corner. Three of these men, including Hopkins, (according to the testimony of the two survivors), had been drinking white mule and beer continuously for some hours (R., 42, 34). The fourth man had just joined them. (The group had been disorderly and awakened neighbors, which accounts for two of the neighbors who testified to looking out of the window.) Valotta and Palermo walked out around the curb, keeping in the highway outside of the curb. As Valotta passed, Hopkins, a striker and one of the group, made a reference to Valotta as a guinea scab and came at him in a threatening manner, stating that he would kill him (R., 142).

Valotta backed up against the wall of a house and as Hopkins came on with threatening gestures, he fired one shot at him when he was about six or eight feet away. Valotta and Palermo then turned and ran away. Valotta has been convicted of murder in the second degree for this killing. Officer Couch, who, up to this point was not present, was coming along Irwin Avenue and had almost reached the corner of Freedmore Street, heard the shot and ran around the corner. Two of Hopkins' companions, Brady and Rodgers, started in pursuit of Valotta. Conoran remained on the corner. Officer Couch shouldered his way past Brady and Rodgers (R., 34), joining in the pursuit when Valotta had a lead of about twenty feet. The pursuit continued ninety to one hundred feet and before Valotta had reached McCullough Alley the officer had gained on Valotta until he was about ten feet from him (R., 34). Valotta was running on the side-

walk with the buildings to his left. Couch was outside of the curb and a little behind Valotta. During all this time Valotta had his back to his pursuers and had no knowledge of any officer being in the neighborhood and knew only of the companions of Hopkins as his pursuers. Hearing the footsteps of one pursuer almost upon him, and fearing for his life, he turned halfway around and fired four shots as rapidly as he could pull the trigger (R., 51). These shots were fired when Couch was almost upon him and he could not miss. The first shot hit Officer Couch when he was in an upright position as shown by the course of the bullet, which struck him on the left side of the abdomen and traveled through his body horizontally. The second shot struck Officer Couch when he was in a crouching position, as shown by the fact that it struck him near the navel and took a downward course through his abdomen. The third shot struck him when he had gotten down so low that the top of his right shoulder was lower than his right shoulder blade, for the bullet went over the shoulder and went under the shoulderblade. The fourth shot was evidently fired when Couch in a low crouching position was just about seizing Valotta, for the bullet struck him on the side of the jaw, traveling through it horizontally and there was on his jaw a powder mark four inches in diameter (R., 19).

The Commonwealth called six eye-witnesses of the shooting. Four of them, Brady, Rodgers, Conoran and Palermo, were on the street at the time, Brady, Conoran and Rodgers being companions of Hopkins and Palermo a companion of Valotta.

Three of these men did not know that Couch was an officer until after the last shot was fired. One of them, Brady, recognized him as he brushed by his shoulder on the corner of Freedmore and Irwin. Two

witnesses were looking out of bedroom windows. Richard Porter, who lived on Brighton Road opposite the end of Freedmore Street, did not see Valotta at all, seeing only the flash of his gun. He saw a reflection from the brass buttons of the approaching officer which made him think he was an officer and afterwards he went down and examined the body and confirmed the impression. The other witness, A. Musher, was looking out of a third story window on Irwin Avenue opposite the dead end of Freedmore Street and when the officer came around the corner and joined in the pursuit, the officer's figure was outlined against the pavement as he approached the electric light on McCullough Alley and he recognized him as an officer.

All the testimony agrees that the night was dark, that there was a smoke laden fog and on the street people could not be recognized at any distance. The testimony in conjunction with the course of the bullet wounds shows conclusively that when Valotta half turned, Couch ducked low and ran in on him and that the interval between Valotta's first shot and his last shot could not have been more than a second or two, the time required for Couch to advance ten or fifteen feet.

Like three of the four other men with him on the street at the time, Valotta did not know Couch was an officer until he went down after the fourth shot. He then saw the officer's cap (R., 151). He fled to his home, asked his brother to take care of his family (R., 130), wandered around for a few days and was finally arrested.

When arrested he did not deny the shooting, told the policemen where he had thrown the revolver and when taken by the officers to the scene of the killing, pointed out the various places connected with the homicides.

Two indictments charging murder were found against Valotta, the one for the killing of Couch and the other for the killing of Hopkins, the former being No. 17 and the latter No. 19 February Sessions, 1923. Each indictment contained a count for murder and for voluntary manslaughter. The prisoner was arraigned on one indictment and pleading not guilty, was immediately arraigned on the other and issue joined. Valotta being without money, the court appointed a counsel to defend him, under the provisions of the Act of March 22, 1907, P. L. 31. The cases were called for trial on March 12, 1923. The docket entries of the cases were written up as though they were separately tried. The record at each number shows the convening of the court, the arraignment, the plea, the joinder of issue, the reading of the indictment, the instructions of the Clerk to the jury, the list of jurors challenged, the jury made up and sworn, the list of witnesses for the Commonwealth and for the defendant and the verdict of the jury. As a matter of fact the cases were called by the District Attorney before the same jury at the same time, all the testimony of the Commonwealth as to both homicides being offered, and when completed the Commonwealth rested.

The verdict of murder in the first degree was returned by the jury for the killing of Couch and the verdict of murder in the second degree for the killing of Hopkins. The Court charged the jury with relation to both indictments, submitting to them the possibility of eight several verdicts, namely, murder in the first degree, murder in the second degree, voluntary manslaughter or not guilty in each case, the jury being instructed to find a separate verdict in each.

The record does not disclose, nor does it appear that there was any offer by the Commonwealth or any order of the court to consolidate the indictments; any

consideration by the court as to the right or propriety of trying the cases together; any exercise of discretion by the court in relation thereto; any putting of the Commonwealth to an election as to which case it would try; any suggestion to the defendant as to his right to separate trials; any consent on behalf of the defendant or his counsel to a joint trial on the two indictments; or any notice to the defendant of his right to twenty peremptory challenges under each indictment.

After the verdicts, the question of the legality of a single trial on the two indictments was raised by defendant in his fourteenth reason for a new trial, which was refused. The Supreme Court of Pennsylvania dismissed the appeal and refused to hear a petition for reargument.

The writ of *habeas corpus* was then issued upon petition of relator, and after hearing the prisoner was ordered discharged.

IV.

Summary of Argument.

(1) Verdict, judgment and sentence in the state court are void by loss of Jurisdiction.

(A) Because the relator was deprived of substantial rights assured to him by the Constitution, and statutes of the state and was not tried in accordance with the established procedure in the state in the following respects:

(a) The Supreme Court of the State having ruled that the two indictments charged two separate and distinct offenses, he had a right to separate trials thereon.

(b) Relator was deprived of his right to twenty peremptory challenges under each indictment.

(c) He was deprived of his rights under the Act of Assembly of the Commonwealth of Pennsylvania, March 15, 1911, P. L. 20, providing that a defendant charged with any crime shall not be required to answer any question tending to show that he has committed or been charged with * * * any offense other than the one wherewith he shall then be charged.

(d) The procedure followed deprived relator of "trial by an impartial jury," guaranteed by the State Constitution Art. I, Sec. 9.

(B) Will the Constitutional guarantee of due process of law sustain a procedure under which the District Attorney in his sole discretion may join two or more indictments for murder for one trial, the defendant having no right to object and the court having no function to perform?

V.

Argument.

(1) THE VERDICT, JUDGMENT AND SENTENCE IN THE STATE COURT ARE VOID BY LOSS OF JURISDICTION.

(A) Because the relator was deprived of substantial rights assured to him by the Constitution, and statutes of the state and was not tried in accordance with the established proceedure in the State of Pennsylvania.

The Supreme Court of Pennsylvania (R., 344) in deciding against the question of double jeopardy, said that the offenses charged in the indictments were separate and distinct acts and not one offense.

SOURCES OF PENNSYLVANIA LAW.

The legal history of Pennsylvania begins with the charter granted to William Penn March 4, 1682. This charter granted practically sovereign powers in the making and execution of law. We quote a few sentences (Charter of Wm. Penn, p. 83):

> "Doe grant free, full and absolute power, by vertue of these presents to him and his heires, and to his and their Deputies and Lieutenants, for the good and happy government of the said Countrey, to ordeyne, make, enact and under his and their Seales to publish any Laws whatsoever, for the raising of money for the publick use of the said province, or for any other End apperteyning either unto the publick state, peace or safety of the said Countrey, or unto the private utility of perticular persons, according unto their best discretions, by and with the advice, assent and approbacon of the freemen of the said Coun-

trey, or the greater parte of them, or of their Delegates or Deputies, whom for the Enacting of the said Lawes, when, and as often as need shall require.

* * * * * * * *

* * * doe all and every other thing and things which unto the complete establishment of Justice unto Courts and Tribunals, formes of Judicature and manner of proceedings doe belong, altho' in these presents expresse mencon be not made thereof; and by Judges by them delegated to award processe, hold please and determine in all the said Courts and Tribunals, all accons, Suits and Causes whatsoever, as well Criminall as Civill, personal, reall and mixt;"

The only restriction was that the laws in question should not be repugnant to the laws of England and that there should be appeal to the King. Beginning with this charter there follows a series of laws first propounded by William Penn himself and subsequently enacted from time to time by the Colonial Assembly. During the eighty-five years between the granting of this charter and the Declaration of Independence in 1776, there had grown up a body of Pennsylvania law. The statutes we still have. The practice established by procedure and decisions of the Courts we do not have in full, the first published reports of Pennsylvania beginning with 1 Dallas in 1754. A case by case examination of all Pennsylvania reports in Dallas from 1754 to 1791 discloses that every indictment quoted in the reports was for a single alleged act. Justice Chase in *United States vs. Worrall,* 2 Dallas, 384, says:

"Each colony judged for itself what parts of the common law were applicable to its new con-

dition and in various modes, by legislative acts, by judicial decisions or by constant usage adopted some parts and rejected others."

The early Colonial Acts frequently recite that they are passed to clear up questions of usage which had developed in the Colonial Courts.

The first body of law propounded in 1682 established courts, provided for criminal procedure, and contains the following provision:

Charter to Wm. Penn, Chap. LXIX (Page 129):

"And that all possible Care and tenderness may be showen about the life of men, and to prevent Corruption, * * * *By the authority aforesaid, Be it Enacted,* That in all Causes Capital, and Criminal, the freemen of the County shall be summoned by the Sheriffs, and the names of the freemen shall be writ in small pieces of paper, and put into a hat and shaken; forty-eight of whom shall be drawn by a Child, and those so drawn, shall stand for the Sheriffs Returns; and the first twelve, not reasonably excepted against, shall Stand and Serve for the tryal (viz. chap. 38)."

In *Res Publica vs. Roberts,* 2 Dallas, 124 (1791), there came before the Supreme Court the question arising upon an indictment for adultery. The Court rests its decision on the practice developed in the Colony of Pennsylvania. The report uses the following language:

"The Court, after consideration, delivered the unanimous opinion that under the Act of Assembly and *the uniform practice of eighty-five years* (a practice which though it does not make

the law, must be strong evidence of what the law is) the indictment could not be supported, etc."

This early opinion establishes the fact that the fathers recognized the development of a distinctive Pennsylvania practice resting on usage before the Revolution.

In order, therefore, to ascertain the practice in criminal trials as affecting the trial of two separate indictments for two separate and distinct murders before one jury, at the same time, we must examine the common law of England as it existed in Colonial times, and we must trace the development of that law to the established practice of Pennsylvania, where in many respects it was modified in various regards, in each of the several American Colonies.

There is no English statute on this question which has any validity in Pennsylvania. (The first official published reports of judicial decisions in England begin in 1765.)

From an examination of the English Reports we can obtain a general view of the English law, and the manner and the extent to which that was adopted in Pennsylvania must be ascertained by the inspection of judicial decisions, acts of Legislature and testimony as to practice.

From this investigation it appears that under the common law of England in the Eighteenth Century, the trial of two several and distinct indictments before the same jury was unknown. In the drafting of indictments it was permissible, in the case of misdemeanors, to include in the same indictment separate and distinct counts, and these counts might be either for the purpose of charging different aspects of the

same transaction, (such as larceny and receiving stolen goods), or for the purpose of charging a *misdemeanor* in relation to several distinct transaction or acts, the Court, however at the trial, exercising its right and duty either to quash the indictment or to put the Crown upon its election which one it should try, in order that the prisoner might not be confounded in his defense and the jury distracted.

In cases of felony, the rule was much more strict. It was permissible to charge in one indictment several separate and distinct counts for felony, provided they were simply different legal phases of the same act or transaction. In cases where an indictment by various counts included charges of separate and distinct felonies, it was the duty of the Court to quash the indictment or to put the Crown upon its election which case it should try. This is sometimes referred to as a matter of judicial discretion, but that only means there was no statute. It was a firmly established practice, and the duty rested on the Court to apply the rule, where the facts were within its terms. In case it appeared either before the beginning of the trial or after the trial had progressed, that there were several and distinct charges and that, therefore, the prisoner might be confounded in his defense or prejudiced in his trial before the jury or injured in his right of challenge, then it became the duty of the Court either to quash or to put the Crown to its election.

The distinction between the practice in *misdemeanors* and in *felonies* is sustained partly on the ground of the more trivial nature of the punishment in the case of misdemeanors, and partly on the ground that under the common law there was no right of peremptory challenge in the case of misdemeanors.

The courts sustained the distinction between the practice in misdemeanors and in felonies in part on the ground that a man might well be willing to have a particular juryman sit upon the trial of a particular felony, and yet be very averse to him in the trial of another one joined in the same indictment. The application of this reason is very obvious in the case at bar.

Union labor would desire vengeance for the killing of Hopkins, jurymen in sympathy with the Police Department would desire vengeance for the killing of Couch, but union labor might well be reconciled to the killing of a strike-breaking policeman and friends of the police might well sympathize with one of the men the policeman was endeavoring to protect.

As has been stated, we do not have the complete reports of the Colonial Courts. We do, however, have the early decisions of our own courts since 1754 and the acts of the Legislature, both of which establish beyond all question that in Pennsylvania there has never been any other rule than this, namely, that a prisoner should not be tried at the same time, before the same jury, upon two felonies separate and distinct, and that even in the case of misdemeanors, this practice was of such doubtful validity that it has not been considered sound unless authorized by special Act of Legislature.

It was the rule at common law that a prisoner accused of felony should not be allowed counsel upon his trial upon the general issue "unless some point of law shall arise proper to be debated," so that the judge became in effect counsel for the prisoner. *Blackstone,* Vol. 4, Sec. 355. There was no statute regulating procedure, and consequently it was evolved

by practice. This practice, however, had the authority of law and it is repeatedly said that in such cases it was the duty of the Court to protect the prisoner where it appeared that separate counts in the indictment amounted, in fact, not to several aspects of the same act, but to a charge of separate and distinct crimes. The fact seems to be that the multiplicity of counts describing in various ways the same act, arose from the ingenuity of Crown counsel to overcome the astuteness of the Court in throwing out indictments for technical reasons. This old practice was abolished in the colonies by express provision of law, the Constitution of Pennsylvania providing, Article 1, Sec. 9, that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."

Counsel for appellant comments on the fact that the right to separate indictment is not referred to in Magna Charta. This may well be, because indictments were not in the practice in 1215. They came in toward the close of the Thirteenth Century.

CONSTITUTIONAL PROVISIONS.

The Constitution of Pennsylvania contains the following provisions:

Article 1, Sec. 6. "Trial by jury shall be as heretofore and the right thereof remain inviolate."

The effect of this provision of the Constitution is well set forth by the Supreme Court of Pennsylvania in the case of *Byers vs. Davis*, 42 Pa., 89, on page 94.

> "The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. That mode of trial had long been considered the right

of every Englishman, and it had come to be regarded as a right too sacred to be surrendered or taken away. Even in England it was fundamental or constitutional, so far as any right can be where there is no written frame of government. Its extent and its privileges, how and when it was to be enjoyed, were perfectly understood and in bringing it with them the founders of the Commonwealth doubtless intended to bring it as they had enjoyed it. None of the frames of government or constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the constitution. No intention to enlarge it appears in the laws agreed upon in England in 1682. Our first constitution, that of 1776, declared that 'trials by jury shall be *as heretofore.*' The Constitution of 1790, and the amended one of 1838, adopted substantially the same provision. Their language was, 'trial by jury shall be *as heretofore,* and the right thereof remain inviolate.' All looked to preservation, not extension. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent."

Article 1, Sec. 9 of the Constitution of Pennsylvania is as follows:

"In all criminal prosecutions the accused hath a right to be heard by himself, and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecution by indictment or information, a speedy public trial by

an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

THE COMMON LAW.

It follows that the right of trial by jury as secured and defined by the common law of England and as developed in Colonial practice is and remains the law of the land in Pennsylvania and cannot be changed excepting by statute, and then only by statute which is not in derogation of the right.

What then was the common law as affecting the question involved here?

In reading the multitude of cases on this subject, it is necessary, in order to avoid confusion, constantly to keep in mind certain distinctions:

(1). The distinction between misdemeanors and felonies.

(2). The distinction between misdemeanors and felonies in separate counts in one indictment or separate indictments which simply present different legal aspects of the same act or transaction, or cognate offenses or offenses corollary thereto; and separate counts or separate indictments which severally refer to separate and distinct acts and transactions.

(3). The trial before the same jury consecutively and the trial before the same jury simultaneously.

We make this statement of caution for the reason that many general statements have been made which, on the surface, appear contradictory, but this contra-

diction disappears when the distinctions above stated are kept in mind.

The rule is thus stated by Chief Justice Fuller in *U. S. vs. McMahon,* 164 U. S., Page 76:

> Ch. J. Fuller. "In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or to restrict the evidence to one transaction."

This rule is also laid down in an early New Hampshire case, *State vs. Nelson,* 8 N. H. Reports, page 163, as follows:

> "No court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment, because by such a course he might be confounded in his defense and the minds of the jurors distracted. 3 D. & E., 98, *Young vs. The King."*

We quote from the case referred to as follows: *Young vs. King,* 3 D. & E., 98 (1789).

> "In *misdemeanors* the case in Burrow shows that it is no objection to an indictment that it contains several charges. The case of *felonies* admits of a different consideration; but even such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record whether the offences are or are not different. But if it appear before the

defendant has pleaded, or the jury charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed."

The discretion referred to above is discretion to quash or put the Crown to its election—not to disregard the rule.

The same rule is sustained in *Regina vs. Giddins,* Car. & Mar., page 634.

This was a case in which the defendant was charged with assaulting and robbing two men who were walking together at the time of the assault. The indictment contained only one count and a motion was made to put the prosecution on election under which to proceed. The Court said, Tindal, C. J.:

"I think that the counsel for the prosecution is not to be put to elect. It is all one act and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been, the felonies would have been distinct; but that is not so in the present case."

The *Earl of Halsbury's Laws of England,* Vol. 9, page 342.

"At common law there was no legal objection to several different felonies being charged in different counts in one indictment, but it is a well established rule of practice that, if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the judge will put the prosecutor to his election to proceed and offer evidence on one charge only."

Citing:

Castro vs. Rex, 6 App. Cas., 229 (242);
Young vs. Rex, 3 T. R., 98 (106);
Rex vs. Heywood, Le. & Ca., 451, etc.

Wharton's Cr. Proc. Sec. 344, holds, after discussion the following conclusions:

"1. Cognate offenses may be joined in separate counts in the same indictment.

2. If this is done in such a way as to oppress the defendant, the remedy is to quash.

3. It is permissible, in most states, to join several distinct offenses, to each of which fine or imprisonment is attachable; and upon a conviction on each count, to impose a sentence on each.

4. Yet as to offenses of high grade in all states, and in some states as to all offenses, the court will not permit more than a single issue to go to the jury, and hence will require an election at the close of the prosecution's case, except in those cases in which offenses are so blended that it is eminently for the jury to determine which count it is that the evidence fits.

The object of the rule, it may be added, is, first, to enable the defendant to prepare properly

for his defense; and, secondly, to protect him, by an individualization of the issue, in case a second prosecution is brought against him."

Joyce on Indictments, Sec. 394:

"The common law rule is that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecution may be made to elect and the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proofs the court will neither quash nor enforce an election. And in this connection it is said that the effect of a union on the same indictment of several counts for distinct offences is different, when such distinct offences grow out of the same transaction, and when such offences had no connection with each other. * * * In the second class of cases it is the duty of the presiding judge, *without waiting for a motion to* that end from the defendant, to order the prosecuting officer to elect upon what charge he will continue the trial."

Enc. of Pleading & Practice, 19, P. 532:

"A defendant should not be tried on two different indictments at the same time, nor should two cases of misdemeanor be tried before the same jury and submitted together."

Rex vs. Clendon, Strange 870. (George II R.):

"Indictment setting forth that the defendant made an assault upon Sarah the wife of William Bestniff, and Elizabeth Cooper, and did them beat, wound and evil entreat. After verdict *pro Rege,* it was moved in arrest of judgment that these were two distinct offences, and therefore could

not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested."

People vs. Howell, 4 Johns, 296 (N. Y. 1809):

Kent, Ch. J. * * * In all cases at least where the *right of peremptory challenge does not exist,* and two persons are indicted jointly, they may be tried jointly or separately at the discretion of the court. This is the settled practice, both here and in England, and no objection to it exists sufficient to outweigh the public convenience of the rule."

DEVELOPMENT OF PENNSYLVANIA LAW.

The indictment is the pleading upon which the accused is tried. Upon a plea of not guilty it becomes the issue. In the general case it is not contemplated that he shall be tried upon more than one indictment. The restrictions, therefore, which are imposed upon the joining of several counts in one indictment apply with still greater force to the consolidation of two indictments for purposes of trial, which was unknown to the Common Law. The legislature of Pennsylvania has consistently recognized the rigor of the common law in regard to the joinder of counts in one indictment. From time to time statutes have been passed permitting such a joinder in specific cases. These statutes carry with them the necessary implication that where no such modification of the common law has been enacted by the legislature, the common law itself is still in force. We direct the attention of the Court to these statutes. Pennsylvania has no statute authorizing the consolidation of indictments.

The Act of March 31, 1860, P. L. 427, was in effect a code of criminal procedure. We quote the provisions of this act so far as they relate to the point under discussion:

Section 79:

"The District Attorney may charge wilful and involuntary manslaughter in the same indictment, in which case the jury may acquit the party of one and find him or her guilty of the other charge."

Section 19:

"In every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving said property."

Section 28:

"It shall be lawful in cases of embezzlement by clerks, servants or other persons in the employ of another to charge in the indictment and proceed against the offender for any distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master or employer within the space of six calendar months from the first to the last of such acts."

But note that the law as to felonies is vigorously restated.

Section 25 of the same Act provides:

"In all cases of felony the prisoner shall be arraigned and where any person on being so arraigned shall plead not guilty, every such person shall be deemed and taken to put himself upon the inquest or country for trial, without any question being asked of him how he will be tried, and the inquest shall be charged only to inquire whether he

be guilty or not guilty of the crime charged against him, *and no more.*"

WITH RESPECT TO PROCEEDURE.

Section 1 of the Act of July 9, 1901, P. L. 629, provides:

> "In the trial of misdemeanors and felonies, triable exclusively in the courts of oyer and terminer and general jail delivery, the Commonwealth and the defendant shall each be entitled to twenty peremptory challenges."

Section 40 of the Act of March 31, 1860, provides:

> "In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, *except that in cases of felonious homicide,* the parties charged shall have the right to demand separate trials, and in all cases of joint trials the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more."

It will be observed that Section 79 and Section 18 refer only to the charging of the same offense in two forms, Section 28 expressly permits the joining of counts setting forth several different acts of embezzlement, provided they do not exceed three, and have been committed against the same employer within the space of six calendar months.

The purpose of Section 28 is clearly shown in the Report of the Commission which drew the Act, from which we quote:

Report on *Penal Code 43.* See note in *Purdon,* Vol. 1, page 1036:

"This section is new and is intended to remedy difficulties arising from the common-law doctrines in relation to the joinder of offenses and joint offenders. At common-law, a felony and a misdemeanor, such as burglary and receiving stolen goods, could not be regularly joined: in larceny, counts for receiving were sometimes added, but the practice was regarded as of doubtful legality, until in the cases of *Rex vs. Galloway,* 1 Mood. Cr. Cas., 234, 1829, and of *Rex. vs. Madden,* 1 Mood Cr. Cas. 277, 1830, it was decided to be erroneous. In Pennsylvania the uniform practice has been to unite counts for larceny and receiving, *but in no other kinds of felonious taking has such joinder been permitted.* So at common law, if two persons are charged with jointly receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other, and afterwards delivered to him, will not suffice: *Rex vs. Messingham,* 1 Mood. Cr. Cas., 257, 1830. The proposed section will obviate these technical difficulties, as it permits a count for receiving to be joined in all indictments for felonious taking, and authorizes the conviction of one or more of several persons, jointly indicted, for felonious taking or receiving, either as principals or receivers according to their actual guilt; Report on the Penal Code, 43."

Judge Agnew in the case of *Henwood vs. Commonwealth,* 52 Pa., page 425, makes the following comment:

"The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offences are re-

pugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage; *Rex vs. Ferguson,* 29 Eng. Law and Equity, 536; *Buck vs. The State,* 2 Harris & Johnson, 426; *Harman vs. Commonwealth,* 12 S. & R., 69; *State vs. Hooker,* 17 Vermont, 658; *State vs. Boyer et al.,* 1 McMullen, 190; *Rex. vs. Galloway,* 1 Moody, C. C., 234; Whart. Am. C. L., Sec. 423.

Even in England at this day it is said the joinder of larceny and the receiving of stolen goods are not repugnant: *Whart. Am. C. L.,* Sec. 420; *Rex. vs. Galloway, supra.*

In the Criminal Procedure Act of 1860, Sec. 24, (*Purdon* 254, pl. 24), the joinder of counts for stealing and receiving stolen goods is expressly authorized. The revisors in their report (*Purdon,* 254, note a), say that this had been practiced in Pennsylvania, but the doubts thrown over the practice by the English cases lead them to report the section."

Section 25 expressly provides that upon arraignment, the prisoner having pleaded, shall be put upon the trial of the indictment upon which he was arraigned after he had pleaded not guilty "and no more." If these words "and no more" mean anything at all, they mean that the trial shall be limited to the indictment upon which the prisoner was arraigned. Section 40 of the Act, with reference to two or more persons jointly indicted for any offense, maintains the uniform policy of our law *in favorem vitae.* In other words, while in other cases the court may exercise a discretion to require joint defendants to be tried together, in homicide cases such discretion is not within the power of the court. The right of the prisoner to

defend his life is superior to the convenience of the criminal court and each prisoner may demand as a right a separate trial. The same care for the right of the accused appears in the Act of May 15, 1895, Section 1, P. L. 71. It provides as follows:

> "Arraignment of defendants in courts of oyer and terminer *except where the indictment charges murder* is hereby abolished and in all case triable in such courts of oyer and terminer *except where the charge is murder,* the defendant or defendants shall only be required to plead orally or by writing endorsed on the indictment."

It is clear beyond doubt that the procedure of arraignment, plea, issue and trial on a single issue in homicide cases is expressly retained and preserved.

We have been unable to find a single case either in Pennsylvania or in England where the trial of a prisoner upon two indictments for separate and distinct murders before the same jury, at the same time, has been sustained on the authority of the common law or by an appeal to it.

As stated above, the authorities assign two reasons for the right to separate trial in the case of felonies:

First, the prejudicial effect on the jury of cumulative evidence as to different crimes, and the other, the interference with the right of the prisoner to twenty peremptory challenges on each charge.

There will be no confusion in the reported cases if this fact be kept in mind, viz: AT COMMON LAW NO RIGHT OF PEREMPTORY CHALLENGE EXISTED IN MISDEMEANOR CASES.

The practice slowly grew up of permitting two misdemeanors to be joined in the same indictment, the

judge exercising a discretion for the protection of the prisoner, whether he should quash the indictment, compel the Crown to elect or permit the trial of the indictment. It was doubtful, however, whether two indictments charging separate misdemeanors might in the discretion of the Court be consolidated for trial before the same jury, and Chief Justice Gibson states in 1819 he is unable to find such a case. (*Withers vs. Com., infra.*) In every case the Court exercised a legal discretion and some connection between the two charges always appears. The prisoner at common law in such cases was not confounded in his challenges, because he had none. Such was the common law and the law of Pennsylvania until the Pennsylvania statutes, April 4, 1809, and March 29, 1813, authorized four peremptory challenges in misdemeanors. The effect of this right of challenge in misdemeanor cases must have caught the attention of the Pennsylvania Bar, because in 1818 in the case of *Withers vs. Commonwealth*, 5 S. & R., 59, two misdemeanor actions in separate indictments were, by order of the Court below, consolidated and tried by the same jury at the same time. The prisoner was allowed, however, the privilege of challenging four jurors on each indictment. Counsel for the defendant state in their argument before the Supreme Court that "the entry of the Order of the Court on the record was made expressly with the design of bringing the subject before this Court."

Chief Justice Gibson, in his opinion, recognized the rule that at common law such *misdemeanors* could have been tried together; that at common law *felonies* with the accompanying right of peremptory challenge could not be tried together. But, as he points out, inasmuch as the prisoner was carefully al-

lowed his statutory right of peremptory challenge on each indictment, there was no good reason, *the case being only a misdemeanor,* to depart from the common law rule which was the long established practice, inasmuch as in the case before him the two charges could have been included in one indictment. In other words, the effect of the statute authorizing peremptory challenges in misdemeanor cases was not held to change the common law with respect to the joinder of misdemeanor counts in the same indictment. We quote Judge Gibson's opinion.

Withers vs. Commonwealth, 5 S. & R., 59 (1819), Gibson, J.:

> "I have found no case exactly like the present; but there is a strong analogy between it and those in which several counts for separate and distinct offenses are included in the same indictment; for these are necessarily tried together; and in cases of *misdemeanor,* it has never been held, that separate offenses could not be joined. *As to felonies, a different rule prevails,* and the Court goes so far as to quash, where distinct offenses are charged; or, if no motion for that purpose be made in time, to compel the prosecutor to elect a particular offense, to which alone, the prisoner is held to answer. But in no case has such joinder been considered a cause of demurrer, or ground for a motion in arrest of judgment, but merely as a subject for the discretion of the Court, and therefore, not a matter in which error could be assigned in a Superior Court. The only solid reason for the distinction in regard to felonies, is, that the prisoner having a right to challenge peremptorily, may choose to have a particular juror to try one of the offenses, and yet be alto-

gether averse to him with regard to the other; and thus, if the Court did not interfere, he would in some measure lose the benefit of his right. With us, this reason applies also to misdemeanors—as a defendant may peremptorily challenge four jurors; but whether a Court would therefore quash an indictment comprising two or more *misdemeanors,* would, I apprehend, depend on a sound exercise of discretion, having regard to the particular circumstances of each case; the Court would take care that the right to challenge should be fully preserved, by allowing the defendant peremptory challenges for each offense, or by quashing the indictment, as might seem most expedient. In the present case, the prisoner *was allowed his challenges on each indictment,* and has therefore no ground for complaint. But had it been otherwise, *we could view these two charges only as if they had been included in the same indictment.* It would, therefore, seem that the Court by whom they were tried were the only judges of the proper exercise of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error. The judgment in each case must be affirmed."

This case was followed by a proper case, that of *Commonwealth vs. Wheeler,* 75 Pa. Superior Court, 84 (1921). The Superior Court of Pennsylvania followed the common law principle as modified and above set forth, but it is to be noted that in its opinion on page 88, the Superior Court say that the indictment in question CHARGED ONLY MISDEMEANORS.

"These facts rendered the question whether these indictments, *which charged only misdemeanors,* should be tried together one to be determined

by the Court below in the exercise of his sound discretion; *Withers vs. Commonwealth,* 5 S. & R., 59; *Commonwealth vs. Hartman,* 31 Pa. Superior, 364."

The fundamental principle underlying the rule of law above developed has to do with the Contsitutional guarantee in the law of both England and the United States of an impartial jury. For the purpose of obtaining an impartial jury in felonies, the prisoner was assured two fundamental and inalienable rights.

First, the right of peremptory challenges—in a capital case twenty peremptory challenges.

Second. The right to keep from the jury any evidence not bearing directly upon the crime charged.

In *Young vs. The King,* 3 D. & E., 98, cited above, the Court expressly says that the prisoner "might object to a juryman trying one of the offenses though he might have no reason to do so in the other."

It is the settled law that the jury shall not be permitted to hear evidence tending to prejudice the prisoner unless the subject-matter of the evidence is inseparably connected with the crime charged. This is the settled law in Pennsylvania as it was and is the common law of England. The application of the rule is well illustrated in two cases in which Justice Agnew wrote the opinion.

In *Shaffner vs. Commonwealth,* 72 Pa., 60 (1872), defendant was tried on the crime of murder, having been charged with poisoning his wife. There was evidence of improper intimacy between the defendant and one Susan Sharlock. Evidence was admitted tending to show that Sharlock, husband of Susan, had also died of poisoning with exactly the same symptoms as

the prisoner's wife. Chief Justice Agnew reversed on the ground that this evidence was not admissible and said on page 65:

"It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief, that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed *in the mind of the actor, linking them together for some purpose he intended to accomplish;* or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burthen a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the

commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."

The lines of distinction drawn by Judge Agnew is stated as follows on page 66:

"It is obvious that to connect together the deaths of Sharlock and Nancy and make the former bear upon the latter, they must have been both contemplated by the prisoner as parts of one plan in his mind, in which the taking of Sharlock's life was part of his purpose of taking the life of Nancy. He must, therefore, have contemplated the death of Nancy before taking the life of Sharlock."

In this case Judge Agnew excluded the evidence for the reason that the testimony did not come up to the measure of the rule.

In the case of *Brown vs. Commonwealth,* 76 Pa., 319, it appeared that two indictments were found against Joseph Brown, one for the murder of Daniel S. Kramer and the other for the murder of Annetta Kramer, his wife. He was first tried on the indictment for the murder of the husband and was found guilty of murder in the first degree and sentenced to be hung. This verdict was reversed on the ground that the Grand Jury had not been properly selected.

Subsequently the Commonwealth went to trial on the indictment for the killing of the wife. It ap-

peared that both husband and wife had been killed at their home and apparently by the same weapon, and that the object was robbery. The body of the husband was found about three hundred yards from the house. In the trial of the second indictment for the killing of the wife, evidence was introduced with relation to the finding of the body of the husband. Judge Agnew says, page 337:

> "That the commission of a distinct offense, even similar in character, cannot be given in evidence against the prisoner, was held in *Shaffner vs. Commonwealth,* decided in Harrisburg in 1872 (22 P. L. Smith, 60), but when two persons are murdered at the same time and place and under circumstances evidencing that both acts were committed by the same person or persons and were part of one and the same transaction or *res gestae* and tend to throw light on the motive and manner of the murder for which the prisoner is indicted, the case is different. The club found near to the husband being the probable instrument of the death also and the motive, to wit, robbery, being one and the same which led to the murder of both at the same time, being parts of the same *res gestae* they together tend to throw light on each other and there is no reason that the truth should be thrown out by excluding the evidence objected to."

It will be noted in passing that even in this case where the two victims were killed as part of one transaction with a single motive, namely, robbery, there was no attempt to try the cases together. It will also be noted that taking these two cases together, the rule laid down by Judge Agnew is that when evidence of one killing is to be admitted in the

trial of an indictment for another, it can be admitted only when it appears that the two killings were part of a common plan with a single motive or purpose *existing in the mind of the actor.*

The same rule is sustained in the following case:

Snyder vs. Commonwealth, 85 Pa., 519, 521.

"The plaintiff in error was indicted for murder. He was charged with the murder of an illegitimate child of his daughter. The daughter was a witness against her father. As we understand her testimony, she swore, at least in chief, to being present and hearing him commit an act which resulted in the death of her child. On the part of the defense it was claimed that this prosecution was a wicked scheme to ruin and destroy him; that the charge of murder was not at first made. To show this fact, and thus to cast discredit on the testimony of the daughter, the plaintiff in error gave in evidence two transcripts of complaints against him, made after the alleged killing of the child. One made by the daughter charging him with incestuous adultery with her; the other by a friend of her, using her as a witness; charging him with incestuous rape. We do not understand that the plaintiff in error affirmed or denied the truth of the facts averred in either of those complaints. His object in giving them in evidence was to show that she did not then charge him with murder, but with other and lesser offenses. By proving that those offenses only were then charged against him, he sought to impair the force of her testimony in regard to her knowledge of his having previously committed the murder now claimed.

As rebutting, the daughter was recalled and

permitted to testify, under exception, that the complaint charging the rape was true. We cannot see how this evidence was rebutting. It in no manner contradicted the fact that she did not then charge the crime of murder to have been committed by him. Its effect, however, was highly prejudicial to the accused. The indictment did not charge him with the commission of any rape. He was not being tried for such a crime. Without notice, or opportunity to prepare a defense against a charge of such an infamous crime, this evidence went to the jury. It was in manifest disregard of the rule of law that the evidence offered must correspond with the allegations, and be confined to the point in issue. Here he was on trial for the commission of one felony; but the Court admitted testimony of his having committed another felony of an entirely separate and distinct character. *The two could not have been joined in the same indictment.* In case the direct evidence of the homicide was not entirely satisfactory to the jury, yet they may readily have concluded, if he was such a monster as to have committed a rape on his own daughter, he had a heart sufficiently depraved to commit the murder charged against him. The evidence was not rebutting. He was denied that protection on his trial which the law gives to every person charged with the commission of crime."

See also *Goersen vs. Commonwealth,* 98 Pa., 388.

EVIDENCE AND CHALLENGES.

The preservation of the impartiality of the jury by the enforcement of this rule has been so highly regarded by the legislature of Pennsylvania that it passed the Act of March 15, 1911, P. L. 20, providing that "Hereafter any person charged with any crime and called as a witness in his own behalf shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the one wherewith he shall then be charged or tending to show that he has been of bad character or reputation, unless" (here follow exceptions not applicable to the facts in this case).

We next come to a deprivation of right of twenty challenges in each particular case. The record gives no information at all excepting the names of those challenged and this record is the same in the docket entries of each case.

The right of twenty peremptory challenges is expressly secured to the prisoner by the Act of July 9, 1901, P. L. 629, quoted above on page 25. Section 40 of the Act of March 31, 1860, quoted above, expressly provides that where defendants are tried jointly for felonious homicide, each defendant shall be entitled to twenty peremptory challenges and each defendant shall also have the right to a separate trial.

This right of peremptory challenge is as old as the English law and has always been held to be a substantial and inalienable right of the prisoner. It was a right belonging only to the prisoner and not to the Crown.

Blackstone, Vol. IV, page 353: (Lewis's Ed.)

"Challenges upon any of the foregoing accounts are styled challenges *for cause,* which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

This right of challenge has always been one of the fundamental safeguards of the English law. It is held in the case of *Lewis vs. United States,* 146 U. S., 370, quoted on page 49, to be one of the substantial rights of the prisoner which cannot be waived, and this holding is simply a statement of the long estab-

lished rule in regard to right of challenge. It must, therefore, affirmatively appear upon the record that the prisoner had this right. If it does not so appear affirmatively, then he has not had due process of law. It makes no difference how many challenges were actually taken. The mere fact of the two cases being tried together would necessarily confuse and hinder the defendant in the exercise of his right of challenge. It is quite apparent that certain members of the panel might be prejudiced by the fact that a striking member of a labor union was killed, who would have no prejudice arising out of the killing of a policeman, and it is quite apparent that certain members of the panel might have a violent prejudice arising out of the killing of a policeman, who would have no such prejudice arising out of the killing of a union labor striker. The prisoner was entitled to secure an impartial jury in each case by exercising his right of peremptory challenge without regard to how the particular jurors selected might have had feelings prejudicial to impartiality in the trial of the other case.

We refer again to the case of *Withers vs. Commonwealth,* 5 S. & R., 59, see above page 30. In this case Chief Justice Gibson considered very carefully whether or not the statute giving the right of peremtory challenge in misdemeanors had not abrogated the old common law rule permitting the joining of distinct misdemeanors in several counts in one indictment. He finally sustained the court below in that case solely on the ground that the record affirmatively disclosed the preservation of the right of challenge in each case to the prisoner, that is to say, he had his full quota of challenges for each offense. If Chief Justice Gibson, after very deliberate consideration, sustained the trial because the offenses charged might

have been joined in separate counts under one indictment, solely on the ground stated above, how can it be argued in a case where life is at stake, that the humane principles and long established practice of the common law of Pennsylvania, which recognizes neither joinder of separate and distinct felonies in one indictment nor the consolidation of such separate indictments for trial, can be brushed aside in a case where the record is entirely silent on the question of the prisoner's undoubted right to twenty peremptory challenges in each case?

RECOGNITION OF RULE OUTSIDE OF PENNSYLVANIA.

The position taken here is sustained by the great weight of authority in the United States, and so far as we can ascertain, no modification of this view has ever been sustained by the reasoned opinion of any court, except where reliance is placed upon a statute. In fact the Congress of the United States has recognized the same principle because in order to secure the convenience of joining several offenses in one trial, it has had recourse to an express statute authorizing such a procedure. Such a statute would have been unnecessary had the common law permitted it.

We quote a few of the many cases from different states in the Union sustaining the position here taken.

Mayo vs. State, 30 Ala., 32. The defendant was charged under two counts and one indictment for the same offense, the counts being embezzlement and larceny from a storehouse. The Court said:

> "It is a practice sanctioned by common custom and by the law to charge a felony in different ways in different counts of the indictment, so as

to provide for the different phases which the evidence may present upon the trial; and where such is the bona fide purpose of the joinder, of counts, the court never exercises its power of quashing the indictment or compelling an election. *Baker vs. State,* 4 Ark., 56; *Cain vs. People,* 8 Wendell, 203; *Roscoe's Criminal Evidence,* 231, 232, Archb. Cr., P. L., 95, Note 1, Barb. Cr. Law, 340; *People vs. Rynders,* 12 Wend., 425; *State vs. Nelson,* H. & H., 163; *State vs. Coleman,* 5 Porter, 32. The principle to be extracted from these authorities is that the court shall always interpose either by quashing the instrument or by compelling an election where an attempt is made, as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of different and separate transactions; but should never interpose in either mode where the joinder is simply designed and calculated to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction."

McGehee vs. State, 58 Ala., 360—Stone 3:

"If it had been averred in this indictment that the two defendants had committed separate and distinct offenses, at different times—neither being present or participating in the offense of the other—a demurrer to the indictment would have lain, notwithstanding the two charges are identical in character. This, on the well defined ground, that on such trial, it would be necessary to offer proof of two independent transactions, thus producing inextricable confusion of the minds of the jurors."

State vs. Smith, 8 Blackford (Ind.) 488:

"If it appear that the four counts charged separate and distinct felonies and not one and the same felony in different modes, the Court below would have acted rightly in quashing the whole indictment."

Kane vs. The People, 8 Wend., 203 (N. Y.):

"In cases of felony where two or more distinct and separate offenses are contained in the same indictment, the Court in its discretion may quash the indictment or compel the prosecutor to elect upon which charge he will proceed."

People vs. Runders, 12 Wend., 425:

"That there would be an incongruity in incorporating in the same indictment offenses of a different character, such, for instance, as forgery and perjury, cannot be denied, and that in such a case the Court would refuse to hear a trial upon both there can be no doubt, but when offenses of the same character, differing only in degree are united in the same indictment, the prisoner may be and ought to be tried on both charges at the same time. Such is this case. The prisoner was indicted for forging the check and also for publishing it as true, knowing it to be false."

State vs. Nelson, New Hampshire Reports 8, page 163.

"No court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment, because by such a course he might be confounded in his defense and the minds of the jurors distracted. *Young vs. The King,* 3 D. & E., 98.

State vs. Flye, 26 Maine, 312.

"If the different counts are inserted in good faith for the purpose of meeting a single charge, the court will not ever compel the prosecutor to elect."

In the case of *Regina vs. Truman,* 8 Car. and P., 727, the prisoner was indicted on six counts, each charging him with setting fire to a separate house. It appeared that he had fired one house in a row, and all of the others had caught fire therefrom. It was moved that the prosecutor's counsel be put to his election which count he would go upon. Erskine, J., said:

"As it is all one transaction, we must hear the evidence. I do not see how in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that as the case proceeds, the prisoner is not tried for more than one felony."

The Commonwealth vs. Sullivan, 104 Mass., 552. The defendant stole out of an express wagon a number of different packages belonging to different parties, stealing them all at the same time.

"The stealing at the same time and by one taking of several articles belonging to different persons, is larceny of the whole and of each article and may be indicted either in one aspect or the other, as one entire crime or as several distinct offenses."

Held that these cases could be tried together.

In *State vs. Henry,* 59 Iowa, 391, it was held that the forging and uttering of forged papers are two distinct offenses and cannot be charged in the same indictment. No objection was made at the trial and the question was raised for the first time before the Supreme Court. The Supreme Court said:

"In view of the fact that appellant's counsel may have waived rights upon which he may have insisted because of the ruling in *State vs. Nichols, supra,* we are of the opinion that the judgment of the court should be so far modified as to impose a sentence of four years only upon the first count of the indictment."

In *McClellan vs. State,* 32 Ark., 609, defendant was indicted for forgery and for uttering a forged instrument, on two separate indictments. He was tried on them together. The Court said:

"It was an irregularity, to say the least, to try the two indictments together. Such a practice would produce great confusion and uncertainty and should be condemned.

Judgment must be reversed and the cause remanded, with instructions to the court below to arrest the judgment and to hold the defendant in custody until the charges may be again inquired into and passed upon by the grand jury."

In *State vs. Devlin,* 25 Mo., 174, defendant was put on trial for assault and battery. After the evidence on both sides was closed, the Court refused to submit the case to the jury, as requested by defendant and against objection on his part to calling the next case on the docket, being case of misdemeanor, and impaneling the same jury, heard the evidence in the same and submitted both cases to the same jury at the same time. Held to be error. The Court said:

"This may be looked upon as a simple matter and that the irregularity might have done injury to either party, but it is, nevertheless, an irregularity which this court cannot allow. If we begin in this manner to sanction such a proceeding, we cannot tell when or where it may end.

It is the right of the accused to have his case tried by a jury free from an improper bias. This trial must be in its nature a single matter, and the court has no right to impose on the defendant and his counsel the necessity of waiting and listening to a different prosecution for a different offense."

The common law permitted the joinder of misdemeanors in separate counts for trial before one jury, the authorities giving as a resaon that in misdemeanors the defendant was not entitled to peremptory challenges, (See *4 Johns,* 296, *supra*), but this procedure was permitted only in the sound discretion of the court, and where in the exercise of that discretion the court was of the opinion that the prisoner would not be wronged, or in the old language, "the prisoner confounded in his defense and the jury distracted" by the cumulation of evidence. (See *Young vs. King,* 3 D. & E., 98, *supra.*)

Coming now to the case at bar, the Supreme Court in its opinion *In re Valotta,* 279 Pa., 84, in considering the question of double jeopardy, uses the following language, page 88:

"Where two persons are killed 'by separate shots or strokes, although in the same riot or affray, an acquittal or a conviction of one * * * homicide is no bar to an indictment for the other as they are distinct acts.' "

In other words, it holds that the offenses charged are separate and distinct.

The only discussing by the Supreme Court of the question now under consideration is as follows (page 88):

"The fifth attack made on the integrity of the

verdict is that it was improper to try the defendant upon the two indictments at the same time. *The record shows that he made no objection to be thus tried.* Assuming but not deciding that notwithstanding his failure to object on trial, he can now be heard to raise this question, the simultaneous trial on two indictments charging murder is warranted and the finding of guilty of second degree on one indictment does not affect the first degree conviction on the other. *Com. vs. Brown,* 264 Pa., 85."

But the Supreme Court does not discuss the question involved at all, but treats it as *Stare decisis* in the Brown case which it cites.

Turning to the case referred to, (*Brown vs. Commonwealth,* 264 Pa., 83), we find that the subject was not discussed at all. In that case the prisoner fired two shots through a closed door, killing two men. The question now under discussion was never raised at any point in the proceeding. It may be positively stated that the Supreme Court of Pennsylvania has never considered and ruled upon this question. In the first case it went by default and this case was used as authority for the ruling in the second case. After a very exhaustive search we find no other case in the books in Pennsylvania of a similar nature. *Brown vs. Commonwealth* also went up from Allegheny County.

WAIVER OR CONSENT.

It will be noted that the Supreme Court in the opinion above quoted, says:

> "The record shows that he made no objection to be thus tried."

An inspection of the record discloses that it is silent, on the matter of objection. It shows no consent. It does not show that the question was ever before the court. This language overlooks the well established rule that in criminal cases the fundamental rights of the prisoner may be lost neither by failure to object nor by actual consent.

In *Lewis vs. United States,* 146 U. S., 370, the Supreme Court by writ of error reviewed a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death. This case lays down several fundamental rules.

(1) A prisoner cannot waive his substantial rights incident to trial by jury.

(2) The right of challenge is a substantial right.

(3) It must appear affirmatively on the record that the prisoner enjoyed the rights guaranteed to him by the Constitution.

(4) The trial of the prisoner in a court of justice is not a private procedure, but the entire public is interested in the result. The case was reversed and a new trial ordered for sufficient reasons.

(5) It did not appear affirmatively on the record that the prisoner was personally present during all of the trial. The Supreme Court quotes with ap-

proval on pages 372 the case of *Prine vs. Commonwealth,* 18 Pa., 103-104.

"It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. • • • And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact."

The Court held that this right could not be waived. Page 374:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial."

And goes on to take the position that the legal procedure in criminal trials is a matter of public concern. We quote further from page 374:

Lewis vs. United States, 146 U. S., 370.

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, or by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by

law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.' So, too, in the case of *Schwab vs. Berggren*, 143 U. S., 442, 448, this language of the court in *Hopt vs. Utah* is cited and approved."

In regard to the right of challenge being an essential right, the Court says on page 376:

"Thus reading the record, and holding as we do that making of challenge was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impression and unaccountable prejudices we are apt to

conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.' 4 Bl. Com., 353; *United States vs. Marchant,* 4 Mason, 158, 160, 162; and 12 Wheat., 480, 482. See also, Co. Lit., 156b; *Termes de la Ley, voc.,* Challenge, 2 Hawk. c., 43, Sec. 4; *Regina vs. Frost,* 9 Car. & P., 129, 137; *Hartzell vs. Commonwealth,* 40 Penn. St., 462, 466; *State vs. Price,* 10 Rich. (Law), 351, 375."

WAIVER.

The rule so laid down in the United States Supreme Court in the above case of *Lewis vs. United States,* and which is sustained by Pennsylvania authority quoted in that opinion, has been fully sustained in Pennsylvania in cases where the Supreme Court gave careful consideration to this question. We quote:

Prine vs. Commonwealth, 18 Pa., 103.

"What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for

when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable."

Mills vs. Commonwealth, 13 Pa., 627.

"But it is contended, that the counsel of the prisoner consented to his being tried at this adjourned court of quarter sessions, and if they did, it ought not to weigh a feather in the scale of justice. *They* may have been ignorant of the law and of his rights, and therefore, made no objection. But it is not the consent of counsel which can constitute a tribunal by which a citizen may be tried and punished. It is the law of the land, and that alone, which can constitute and establish such a tribunal.

I need not repeat the authorities which establish that consent cannot give jurisdiction. In criminal proceedings especially, that axiom has grown with the growth and strengthened with the strength of the law. Trials by lynch law, might otherwise be valid; for, at times, I dare to say, a man might consent to their jurisdiction in hope or in fear, or perhaps in ignorance. But *autrefois acquit* or *autrefois convict* couldn't be pleaded in that case, nor in this; because it is a lawful trial only that can be effectually so pleaded. Some affidavit and some certificates of such consent were produced at bar, but the counsel for the defendant positively deny it on their affidavit. But we can regard neither the one nor the other; they are no part of the record, nor can they be made such.

But for myself, I think it a matter of no account, and if the prisoner had appeared in court, and under his sign manual, on the record, agreed to be then tried, it would not have the slightest influence with me. I look to the law of the land. Something was said of the enormity of the offense. The prisoner undoubtedly, if guilty (in relation to which it is not for me to express any opinion, as he will be tried again), not only violated the highest dictates of morality and good manners, but broke the law, and exhibited a most corrupt and indecent want of taste. But we look only to the record of the trial; it is our duty to see that it is right and lawful. Heeding neither the impulses of passion, nor tolerating the intrusion of prejudice; but in calm severity of judgment, we apply the rules of the criminal law to it. And by that test, we find it wanting. The trial was *Coram non judice,* and therefore null."

Consent cannot give jurisdiction, especially when this principle is appealed to in a case where there are no decisions supporting it.

The Act of Assembly of March 15, 1911, P. L. 20 (quoted *supra,* page 38) expressly provides that a prisoner shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the *one* wherewith he shall then be charged or tending to show that he has been of bad character or reputation. Owing to the fact that Valotta was tried on two indictments for two separate and distinct offenses before the same jury, he was in effect compelled to testify contrary to the provisions of this act. (See his direct testimony.

page (R. 140 *et seq.*) and cross-examination, page (R. 144 *et seq.*)

SUMMARY.

The Constitution of Pennsylvania guarantees to every citizen that the trial by jury, as heretofore, shall remain inviolate, that he shall have a trial before an impartial jury and can be condemned only by the judgment of his peers or the law of the land.

The trial by jury, as defined by the Constitution and the law of the land, as established in Pennsylvania, is the common law of England, excepting as modified by statute and long established practice.

Under the common law of England, felonies arising from distinct and independent transactions could not be joined in one indictment, nor could several indictments therefor be tried simultaneously before the same jury. The courts of Pennsylvania have always recognized this rule. The Legislature of Pennsylvania has recognized it by passing various statutes permitting some variation therefrom in lesser cases and absolutely prohibiting it in murder cases. There is no statute permitting consolidation of indictments and there is no practice in Pennsylvania, and there is no considered decision by any court in Pennsylvania holding contrary to the rule in question. The opinion of the Supreme Court in the case of Joseph Valotta is the first opinion written by any court in Pennsylvania holding to the contrary in a homicide case, and that opinion is not a considered opinion, but refers to a former case as authority, in which the question was neither raised, mentioned, discussed nor decided. We except, of course, the opinion of the trial court which briefly bases the trial of the indictments together on *Withers vs. Commonwealth,* 5 S. & R., 59 (R. 222),

the court failing to note that the case cited deals with misdemeanors and not with felonies and that it affirmatively appeared of record that the right of challenge was absolutely preserved therein.

What are the rights of the defendant upon a trial of an indictment upon which he is charged with murder in the Commonwealth of Pennsylvania?

The following propositions are clearly sustained by both law and practice:

(1) He is to be charged with one offense and no more.

(2) He is to be arraigned on a single indictment to which he pleads, and if pleading not guilty, the issue is joined and the trial is upon that indictment and no more.

(3) He is entitled to twenty peremptory challenges upon each indictment.

(4) No evidence can be admitted with respect to any other separate and distinct crime charged.

(5) He is entitled to a trial by an impartial jury, the impartiality to be secured under the safeguards of the law in regard to challenge, procedure, trial and evidence.

(6) He cannot be convicted unless the Commonwealth presents evidence sufficient to convince the jury of his guilt beyond a reasonable doubt.

(7) He is not permitted to waive any of the substantial rights guaranteed to him as above set forth.

(8) Upon appeal, every presumption is in favor of the prisoner. The record must affirmatively disclose every fact of evidence or procedure upon which the Commonwealth relies to sustain the conviction.

(9) There is neither any provision in law nor any practice in Pennsylvania for the consolidation of indictments of this class.

(10) By the provisions of Section 25 of the Act of March 31, 1860, the accused in a case of felony is to be tried upon the issue presented by that indictment and no more, and the trial of the accused on an additional indictment is *coram non judice.*

The Supreme Court of Pennsylvania sustains the verdict upon a statement of fact copied almost *verbatim* from the Commonwealth's printed brief (R. 313, 314) but the evidence of the Commonwealth itself flatly contradicts this statement. The state courts have entirely overlooked the rule laid down in *Hunter vs. Commonwealth*, 79 Pa., 503:

> "By the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused and the more jealously does the law guard every legal right to which he is entitled."

Therefore, by the consolidation of the indictments in this case or rather since there was no order of Court to that effect, by the arbitrary trying of them together without consolidation, Joseph Valotta was denied due process of law and equal protection of the laws in every one of the particulars stated above, each one of which is a substantial and inalienable right which the policy of the law gives to the accused, and which cannot be waived by him. Not only can no authority be found for the procedure referred to, but no established practice can be appealed to. There has never been any such practice. So that Valotta, in the trial of this case, has been convicted by an unusual and extraordinary proceduce and has not had the equal protection of the laws guaranteed to him by the Constitution. By

such procedure the jurisdiction of the state court was lost and the sentence thereunder and all proceedings thereafter became and are null and void.

In support of the position here taken upon the hearing of this writ, a number of distinguished lawyers of long experience in criminal practice in the State of Pennsylvania were called to testify as to the actual practice in their several jurisdictions. Their testimony covered practically the entire state (R., 250-292). The testimony of these gentlemen is clear, explicit and fully sustains every position taken in this brief.

DO THE FACTS IN THIS CASE SUSTAIN A FINDING OF LOSS OF JURISDICTION IN THE TRIAL COURT?

In preparing this brief counsel for appellee has just discovered an omission in the printed record. On page 9 appears docket entries marked "No. 17-19 February Sessions, 1923." Then follow the docket entries in the case at No. 17 (Couch case), the docket entries at No. 19 (Hopkins case) not being printed. As a matter of fact, there are complete docket entries in each case, the only difference being in the name of the deceased. The facts in regard to these entries, as they were submitted in evidence in the court below, are stated by Judge Thomson in his opinion (R., 326). This procedure is absolutely void under Section 25 of the Act of March 31, 1860, P. L. 427, quoted above on page 24.

Under this statute, after arraignment and plea, the jurisdiction of the court is expressly confined to trying the prisoner upon the charge set forth in the indictment "and no more." The trial of the second

indictment is *coram non judice.* It follows, therefore, that after arraignment and plea on the first indictment, the jurisdiction of the court was exhausted and when it proceeded instantly to arraignment and plea under the second indictment, it was proceeding without any jurisdiction.

There is nothing in the record to show under which indictment arraignment and plea first occurred. The docket entries in the two cases are absolutely identical and absolutely parallel excepting for the change in the deceased's name. For the purpose of maintaining the judgment in this case, all jurisdictional facts must affirmatively appear. The Court will not conclusively assume that either one of the indictments was first presented and there is, therefore, nothing on the record to sustain jurisdiction under the statute.

But apart from the order of presentation, there was no authority in the court under the statute to try the two cases together, particularly when the joint trial rests merely on the action of the District Attorney and without any action on the part, either of the court or of the defendant.

CHALLENGES.

The right of twenty peremptory challenges in each case is given defendant by Section 1 of the Act of July 9, 1911, P. L. 629, quoted on page 25.

Only twenty challenges were allowed (R., 301) but in this case the defendant could not take advantage of his right to challenge but was confounded therein. There is a feud between union workers and policemen. There is a feud between union workers

and so-called "scabs." Sympathizers with union labor would unquestionably desire to "get" Valotta for the killing of Hopkins. Sympathizers with members of the police force would undoubtedly desire to "get" him for killing Couch, while union labor might well look leniently on the killing of a hostile officer, and the officer's friends might well look leniently on the killing of a union man at a time when there was actual conflict between the two bodies. The clear purpose of peremptory challenge, therefore, was nullified by the joint trial and the Court was without jurisdiction to proceed in violation of the statute.

EVIDENCE.

The Act of March 15, 1911, P. L. 20, quoted on page 38, forbidding that the defendant be required to answer any question tending to show that he has committed or been charged with * * * any other offense, was in effect nullified. While technically the defendant was not required to go on the stand at all, nevertheless he either had to stay off the stand entirely, thereby subjecting himself to the necessary implications from such silence, or he had to go on the stand and testify in regard to the facts under both indictments, thereby subjecting himself to cross-examination, contrary to the purpose of the act. If the Hopkins case had been tried separately, it would not have been admissible in that case to prove the shooting of Couch, nor would the death of Hopkins have been provable in the Couch case.

We submit that the matters complained of are not mere errors of procedure but are denial of due process of law within the decisions of this court.

In *Ex parte Bane,* 121 U. S., 1, the prisoner was indicted for embezzlement under Federal statute. The indictment contained the words "with intent to deceive the controller of the currency, etc." At the trial the indictment was demurred to. The court struck from the indictment the words "the controller of the currency and" as being surplusage and not material and proceeded with the trial. The defendant was found guilty. Upon writ of *habeas corpus,* notwithstanding the merely technical character of the change, the Supreme Court held that the trial court had lost its jurisdiction. We quote from page 13:

> "It is of no avail under such circumstances to say that the Court still has jurisdiction of the person and of the crime; for, though it has possession of the person and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment."

In *Ex parte Lange,* 85 U. S. (18 Wall), 163, the writ was directed to the marshal of the Southern District of New York. It appeared that the prisoner had been convicted and sentenced. Subsequently the court revoked the sentence and resentenced the prisoner. This court held that although the trial court had jurisdiction it had exhausted that jurisdiction by imposing the first sentence and it had no jurisdiction to impose the second sentence. The Court said on page 178:

> "There is no more sacred duty of a court than in a case properly before it to maintain unimpaired those securities for the personal right of the individual which has received for ages the sanction of the jurists and the statesmen; and in

such cases no narrow nor illiberal construction should be given to the words of the fundamental law in which they are embodied."

Ex parte Neilson, 131 U. S., 176. Neilson was convicted in the Territory of Utah for co-habiting with more than one woman, and sentenced. Thereafter he was indicted for adultery on the same subject-matter and convicted. The Supreme Court sustained the petition for habeas corpus. It was held that the trial court had jurisdiction of the case but had no jurisdiction to sentence a prisoner in violation of the Constitutional guarantees of the Fifth Amendment.

The case of *Hopt vs. Utah,* 110 U. S., 574, came before the Supreme Court on writ of error, but the language of the Court is broad enough to make it pertinent in this case. The defendant was charged with murder in the first degree. Under the statute of Utah the trial was by triers appointed by the Court; all challenge of proposed jurors in felony cases must be had in the presence as well of the court as of the accused. This court held that the presence of the accused could not be dispensed with. Justice Harlan says on page 579:

> "If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

In the case of *Frank vs. Mangum,* 237 U. S., 309, the prisoner was indicted for murder, tried and convicted and the conviction sustained by the Supreme Court of the state. On writ of *habeas corpus* to this court two questions were raised.

(a) A fair trial was not had by reason of mob disorder at the trial.

(2) The absence of the prisoner when the verdict came in.

There was no question that the trial court had complete jurisdiction upon the commencement of the trial and that the entire procedure was affirmed by the Supreme Court of the state. Nevertheless, this court regarded the two matters charged as proper grounds for considering the petition.

It refused to act upon the charge of public disorder because testimony had been taken on this matter before the Supreme Court and the record in regard thereto had not been remitted for review. This court says on page 336:

> "The mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be sufficient to raise an issue respecting the correctness of that determination; especially not where the very evidence upon which the determination was rested is withhold by him who attacks the finding."

On the second point the Court held that the absence of the prisoner at the time the jury came in had been waived and that under the well established practice of Georgia, the prisoner was permitted to waive his presence.

In this case, on page 326, this court holds that due process of law must include the following elements:

> "(a) A criminal prosecution in the courts of the state.

(b) Based upon a law not in itself repulsive to the Federal Constitution.

(c) Conducted according to the settled course of judicial proceedings as established by state law.

(d) There must be notice.

(e) There must be a hearing or an opportunity to be heard.

(f) It must be before a court of competent jurisdiction.

(g) It must be according to established modes of procedure."

(The lettering is ours.)

We particularly call attention to these two requisites:

"(c) Conducted according to the settled course of judicial proceedings as established by state law.

(g) It must be according to established modes of procedure."

If these issues properly rise upon a writ of *habeas corpus*, then the Federal Court must judicially determine them. In order judicially to determine them, it must make an inquiry and ascertain whether or not the requisites stated have been complied with. It is argued that a mere statement of the Supreme Court of the state conclusively determines what that practice is. Such a position nullifies the jurisdiction of this court in these respects and makes any proceeding thereunder a mere futility. Under the position maintained by appellant the state court might proceed with the most obvious and complete disregard of its established practice and in the clearest violation of its jurisdiction. Nevertheless if the Supreme Court

of the state should sustain the practice, the door is closed to any inquiry under writ of *habeas corpus* and the two grounds for jurisdiction of this court, quoted above, would necessarily fail. On the contrary, the court has taken exactly the opposite position. The procedure under writ of *habeas corpus*, is no longer the common law proceeding. As this court well stated in the case of *Frank vs. Mangum*, on page 330:

> "It results that under the section cited a prisoner in custody, pursuant to the final judgment of a state court of criminal jurisdiction, may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against it."

In the case of *Moore vs. Dempsey*, 261 U. S., page 86, five negroes were convicted of murder in the first degree and sentenced to death by the court of the State of Arkansas. This conviction was sustained by the Supreme Court of the state. There was no question of the initial jurisdiction of the court. This court in its opinion, referring to the *Frank vs. Mangum case*, says on page 91:

> "We assume in accordance with that case that the corrective processes applied by the state may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of

public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

The Court then comments upon the fact that the Supreme Court of the State of Arkansas had sustained the verdict and concludes with the following language on page 92:

"We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States *to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.* We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable, that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed."

B. WILL THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW SUSTAIN A PROCEDURE UNDER WHICH THE DISTRICT ATTORNEY IN HIS SOLE DISCRETION MAY JOIN TWO OR MORE INDICTMENTS FOR MURDER FOR ONE TRIAL, THE DEFENDANT HAVING NO RIGHT TO OBJECT AND THE COURT HAVING NO FUNCTION TO PERFORM?

We have heretofore argued that the trial court lost its jurisdiction because it proceeded in its trial in a manner not only unauthorized, but expressly prohibited by the statutes regulating the exercise of such jurisdiction and by the long established practice. We now come to the proposition that the practice actually followed in this case is so inherently vicious, so repugnant to every conception of the fundamental rights of defendants under our body of law, that without regard to questions of statutory jurisdiction this procedure must be condemned as denying to the defendant due process of law.

We have pointed out that wherever consolidation of separate indictments for separate felonies has been permitted, it has been permitted after the exercise of a judicial discretion, the purpose of that judicial discretion being to ascertain whether or not in the particular case such a procedure would deny to the defendant his right to a fair and impartial trial. The statute of the United States permitting the joinder of indictments in such cases recognizes this rule of judicial discretion by inserting the words "which may be properly joined" (p. 70 *infra*). This safeguard of the defendant's right is entirely obliterated in Pennsylvania if this case stands. Admittedly there was no exercise of judicial discretion. The only discretion exercised was that of the District Attorney, who, under

the practice contended for, performs the judicial function and decides whether or not the cases should be tried together. If in his discretion he can unite two charges for murder, he can unite more than two, or he may unite any number of felonies if he sees fit to do so. It is disposed of simply by the remark of the trial judge on motion for new trial (R., 222): "This reason is without merit," and the remark of the Pennsylvania Supreme Court (R., 236): "The simultaneous trial on two indictments charging murder is warranted."

This statement is without reservation or limitation and it is made in a case in which admittedly there was no exercise of judicial discretion.

It is apparent from the testimony offered by appellant that a vicious practice has grown up during recent years in Allegheny County, which is thus stated by the District Attorney, under whom this case was tried (R., 296):

> "It has been the practice ever since I have been in the District Attorney's office that where there was no objection on the part of the defendant, both murder cases, under those circumstances, were tried together by one jury, tried at the same time. If there is any objection on the part of the defense, we treat it as a matter of right for him to object, but if * * * do not object, we very frequently try them together *unless the Commonwealth felt it was better for their interest to try them separately.*"

While the District Attorney does not go as far as the Supreme Court and hold that the defendant has no right to object, he flatly says that the matter of joinder of indictments in one trial is entirely within the discretion of the prosecuting officer. Judge Row-

and, formerly District Attorney, testifies to the same practice in his court and says that although there were two cases joined, but twenty challenges would be allowed (R., 301). He says also that in such cases the Court takes no action (R., 303) but he has not considered whether or not the defendant may object as a matter of right. Judge Haymaker, formerly District Attorney, states the practice (R., 305):

> "If the defendant has been arraigned on two or *three* separate indictments, if he does not elect to be tried upon one and there is no objection on the part of his counsel, he is invariably tried upon all of the indictments at one time."

He also says (R., 306) that objection to joint trial would be sustained, and on page 307:

> "The judge trying the case would simply take no initiative in the matter at all. He would wait to hear from the counsel for the defendant."

As appears from the testimony of many attorneys offered by relator and referred to above (R., 250 *et seq.*), such procedure is entirely unknown anywhere else in the state, and consideration of it never reached the Supreme Court of this state until in the instant case.

It is clear, therefore, that the appellant contends and rests the validity of the verdict, judgment and sentence in this case upon this flat proposition.

The prosecuting attorney may in his discretion join in one trial any number of indictments. The judge sits mute, the prisoner has no right to object and verdict of conviction under such procedure is "warranted." It will be observed that while the officers of the Allegheny County Court more or less vaguely believe that the prisoner has a right to object,

the Supreme Court brushes this consideration aside and wipes out his right to object.

The District Attorney, inevitably influenced by the bias of counsel and considerations of convenience, seizes upon and exercises the judicial function and his decision cannot be reviewed. It may explain but does not excuse the position of the Allegheny County Court officers, that they are conducting criminal courts in a great industrial center; that they have a huge grist of criminal cases in which the defendants are very largely illiterate, insignificant and unconsidered foreigners, for whom there is no public consideration and against whom there is apt to be very considerable prejudice. It is not strange that under such circumstances prosecuting attorneys, in their hurry to clear up their docket and in their desire to make a creditable record of convictions, should take short-cuts and should be satisfied with the exercise of their own discretion. It is not strange that trial judges, sitting through the weary grind of such cases, should relax their vigilance for the protection not only of the right of the original prisoner but of the fundamental rights of American citizens.

In the instant case this procedure becomes particularly obnoxious to all sense of justice when it is recalled that the defendant was an illiterate foreigner who could have no knowledge whatever of his rights, and who was defended, as we shall later point out, by an officer of the Commonwealth of Pennsylvania appointed under the statute of Pennsylvania to conduct his defense.

The principle here contended for is recognized by this court in the case of *Pointer vs. United States*, 151 U. S., 396, 400:

> "It is provided by section 1024 of the Revised Statutes—following, substantially, the words of the act of February 26, 1853, c. 80, 10 Stat., 161, that 'when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated.'
>
> Although the two murders in question are alleged to have been committed by the defendant on the same day, and in the same county and district, it does not affirmatively appear from the indictment that they were the result of one transaction, or that they were 'connected together.' But the indictment does show upon its face that the two offenses are of the same class or grade of crimes, and subject to the same punishment. Could both crimes properly be joined in one indictment, in separate counts? The statute does not solve this question, but leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law. *If those principles permit the joinder of two or more felonies in the same indictment, in separate counts, then the joinder in question here was proper.*"

It will be observed that this statute is sustained on the express ground that the court exercised its discretion. The cases cited by the Supreme Court in that opinion all sustain our position. Not one of them was a capital case. They are as follows:

Logan vs. U. S., 144, U. S., 263. The charge was conspiracy (misdemeanor), and indictments were consolidated under Act of Congress.

Commonwealth vs. Gillespie, 7 S. & R., 469. Indictment for conspiracy to sell lottery tickets and separate counts for sale of different tickets. The court said that the several counts were different modes of laying the same offense.

People vs. Yates, 13 Wend., 311. Defendant charged in one indictment with two separate offenses of obtaining signatures by false pretenses committed at different times. Apparently misdemeanors. Held, it was no error to join counts in one indictment, but the indictment was quashed for other reasons.

U. S. vs. O'Callahan, 6 McLean, 596. Distinct counts in one indictment charging the passing of counterfeit coins at different times and on different occasions. The Court said that the Federal statute allowed such practice, and went further to say that "This may perhaps have been done to meet the proof."

Kane vs. People, 8 Wendell, 203. (Misdemeanors.) Defendant was charged with failure to repair roads as director in two companies. The same transaction.

Carlton vs. Commonwealth, 5 Metcalf, 532. The same transaction. One count was burglary and the other larceny in stealing cloak at the same time.

The main ground urged for reversal was joining the times for two separate offenses in one sentence.

Commonwealth vs. Hills, 10 Cushing, 530. Separate counts charging three separate offenses of receiving and aiding in the concealment of stolen goods. The Court was not sure that the crimes were felonies, but said that long-established practice in Massachusetts allowed the joining of distinct larcenies in the same indictment and also the joining of distinct counts for receiving stolen goods in the same indictment.

Burk vs. State, 2 H. & J., 426 (Md.). The same transaction. One count rape and the other assault with intent to commit rape. One felony and one misdemeanor. Attorney General elected to go ahead on one count and abandoned the other count before the jury was sworn.

Stores vs. State, 3 Mo., 7. (Misdemeanors.) Selling liquor. Several sales to different persons set forth in the same count. Judgment affirmed. The Court said:

> "It is held that even distinct felonies of the same character and degree, though committed at different times, may be charged in the same indictment and it will be no ground either of demurrer or arrested judgment. *1 Chitt.,* L. P., 171."

Baker vs. State, 4 Pike, 56 (Ark.). Same transaction. One count for shooting at J. F. with intent to kill and the other count for shooting and disabling J. F. Both counts put in to meet the single charge.

Campbell vs. State, 9 Yerger, 333 (Tenn.). Same transaction. Charge was theft of fifty dollar bank-

note. There were three counts put in different ways to meet the evidence. The one for stealing and the other two for receiving the stolen banknote from different persons. The Court said:

> "But every separate count charges the defendant as if he had committed a distinct offense *because it is upon the principle of the joinder of offenses that the joinder of counts is admitted. 1 Chitt. Criminal Law*, 249.

Wright vs. State, 4 Humphreys, 194 (23 Tenn.). Same transaction. Different counts to meet the evidence under one offense of rape.

Johnson vs. State, 29 Ala., 62. Same transaction. Distinct counts of obtaining money by false pretenses and larceny to meet the evidence. Same facts.

Weinzorpflin vs. State, 7 Blackford, 186 (Ind.). Same transaction. The three counts were rape, assault and battery and assault and battery to commit rape.

State vs. Hazard, 2 R. I., 474. Same transaction. The counts were (1) stealing and (2) receiving same goods, knowing them to be stolen.

Hoskins vs. Georgia, 11 Ga., 92. Same transaction. The first count was making forged instrument. In the second count the same instrument was called an order or bill. The third count was uttering the same paper and the fourth count was having the same paper in possession with intent to fraudulently pass the same.

This practice becomes if possible still more obnoxious in view of the following facts.

The Act of March 22, 1907, P. L. 31, Section 2, provides as follows:

"Whenever any person, being under indictment, charged with murder, shall make and file with the clerk of the court of quarter sessions an affidavit, setting forth that he or she is wholly destitute of means to employ counsel and prepare for his or her defense, the judge sitting in the court of oyer and terminer, to whom such affidavit is presented, shall assign to such person counsel, not exceeding two, to represent and defend such person at the trial of the case; and when services are rendered by counsel, in pursuance of such assignment, the judge sitting at the trial of the case may allow such counsel all personal and incidental expenses, upon a sworn statement thereof being filed with the clerk of the court of quarter sessions, and also reasonable compensation for services rendered, not exceeding two hundred dollars for each counsel; which allowance of expenses and compensation shall be a charge upon the county in which the indictment in the action is found, to be paid by the county treasurer, or, where the city and county are coextensive, by the city treasurer, upon the certificate of the judge presiding at the trial of the case; Provided, That in order to be entitled to such expenses and compensation, counsel so assigned must file with the judge, sitting at the trial of the case, an affidavit that he has not, directly or indirectly, received, nor entered into a contract to receive any compensation for such services from any source other than herein provided."

On February 6, 1923, F. A. Ammon, Esq., was appointed attorney for defendant under the provisions of the above Act (R-10).

A similar order was entered in the Hopkins case.

The record shows that Mr. Ammon was the sole counsel for Valotta until after the expiration of time for taking out a writ of error to the Supreme Court:

As to why such writ of error was not taken out, we refer to Mr. Ammon's testimony (R-289 *et seq.*). It appears that it was not taken out because it was impossible to raise at least Twelve Hundred ($1200) Dollars for printing the record.

The Acts of Congress cited below provide that in case of poverty an appeal may be taken *informa pauperis.*

Act of July 20, 1892, 27 St. at L. as amended June 25, 1910, 36 St. at L. 866.

> "That any citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appella[illegible] proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after

bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Counsel appointed by the Court to defend Valotta was not advised of this act and the appeal was not taken out because it was impossible to raise a sum in excess of Twelve Hundred ($1200) Dollars for printing the record.

The Court which tried this case appointed counsel for Valotta under the express provisions of the statute cited. By so doing the Commonwealth, through this court, gave solemn assurance to the defendant that he could rely upon the guidance and advice of the counsel so appointed. It appears that this counsel received from the state a fee of $200.00 in each case.

It was not the poverty of this defendant which prevented the taking out of a writ of error, for the law has mercifully provided against such contingency. Valotta was not given the benefit of this provision of law, through the failure of the official counsel appointed for him by the Court.

Finally: We appeal to the Court to consider this case not as a matter of private concern affecting the life of a particular individual, serious as that

may be, but as a case affecting the fundamental rights, liberties, immunities and privileges of every citizen of the Commonwealth of Pennsylvania. Legal safeguards are not destroyed in the trial of exalted personages. They may be insidiously undermined, diminished and eventually swept away in the hurried and routine trial of insignificant defendants. Precedent so established will, if permitted to persist, eventually have the force of law and we may awake later to find that the priceless heritage of law and right, handed down to us by the fathers, has been lost by mere attrition and indifference.

It was for the purpose of protection against such a situation that the Fourteenth Amendment was adopted and it has been so interpreted and applied since its adoption for more than half a century.

Respectfully submitted,

GEORGE R. WALLACE,
Of Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 521.—October Term, 1925.

Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, Appellant, *vs.* The United States of America ex rel. Joseph Valotta.	Appeal from the District Court of the United States for the Western District of Pennsylvania.

[March 15, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from an order on a writ of habeas corpus discharging the relator, Valotta, from the custody of the appellant, by whom he was held under a sentence of death. Valotta shot a man in a street brawl—we will assume, in circumstances that suggest considerable excuse—and then killed a policeman who pursued him, within a short distance from the first act. He was indicted separately for the murder of each man, tried in a Court of Pennsylvania, found guilty of murder in the second degree for the first killing and guilty of murder in the first degree for the second, and was sentenced to death. The judgment was affirmed by the Supreme Court of the State.

No writ of error or certiorari was applied for, Valotta having no funds and his counsel being ignorant of the statute authorizing proceedings in such cases without prepayment of fees or costs. But when the time for such proceedings had gone by, a writ of *habeas corpus* was obtained from a judge of the District Court of the United States with the result that we have stated. The grounds of the order seem to have been that Valotta was tried upon two indictments for felony at the same time and was deprived of the full number of challenges that he would have had if he had been tried separately upon each.

There is no question that the State Court had jurisdiction. But the much abused suggestion is made that it lost jurisdiction by

trying the two indictments together. Manifestly this would not be true even if the trial was not warranted by law. But the Supreme Court of Pennsylvania has said that there was no mistake of law, and so far as the law of Pennsylvania was concerned it was most improper to attempt to go behind the decision of the Supreme Court, to construe statutes as opposed to it and to hear evidence that the practice of the State had been the other way. The question of constitutional power is the only one that could be raised, if even that were open upon this collateral attack, and as to that we cannot doubt that Pennsylvania could authorize the whole story to be brought out before the jury at once, even though two indictments were involved, without denying due process of law. If any question was made at the trial as to the loss of the right to challenge twenty jurors on each indictment, the only side of it that would be open here, would be again the question of constitutional power. That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt.

There was not the shadow of a ground for interference with this sentence by *habeas corpus*. *Frank* v. *Mangum*, 237 U. S. 309, 326. Extraordinary cases where there is only the form of a court under the domination of a mob as was alleged to be the fact in *Moore* v. *Dempsey*, 261 U. S. 86, offers no analogy to this. In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds.

Order reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.